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No. 2576

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

JAMES B. SMITH, F. C. MILLS and E. H.
MAYER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME I.

(Pages 1 to 320, Inclusive.)

Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Northern District of California, First Division.*

Number 5233.

THE UNITED STATES OF AMERICA,

vs.

JAS. B. SMITH, F. C. MILLS, and E. H. MAYER.

Names of Attorneys.

For the United States:

MATT. I. SULLIVAN, Esq., and THEO. J.
ROCHE, Esq., Special Assistants to the At-
torney General, San Francisco, California.

For the Defendants:

STANLEY MOORE, Esq., and PETER F.
DUNNE, Esq., San Francisco, California.

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-
trict of California.*

Clerk's Office.

No. 5233.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAS. B. SMITH, F. C. MILLS, and E. H. MAYER,
Defendants,

**Praecipe [for Transcript of Record on Writ of
Error].**

To the Clerk of said Court:

Sir: Please prepare transcript of record on Writ

of Error in the above-entitled case, and include therein the following:

1. The Indictment.
 2. Arraignment and Pleas of defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, entered March 3, 1913.
 3. Minutes of the Trial beginning with and including the proceedings of December 9, 1913.
 4. Verdicts as to defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively.
 5. Motion for Order Vacating Verdict of Jury and Granting New Trial, filed February 28, 1914.
 6. Minute Order Denying the Motion for Order Vacating Verdict of Jury and Granting New Trial.
- [1*]
7. Order for Judgment entered March 19, 1914.
 8. Minute Order granting defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, thirty days from March 19, 1914, in which to prepare serve, settle and file their Bill of Exceptions.
 9. Judgments as to defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, entered March 19, 1914.
 10. Supersedeas Bonds of defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, for appearance hereafter in the District Court of the United States for the Northern District of California or in the Circuit Court of Appeals for the Ninth Circuit, etc., as may be ordered.
 11. Petition for Writ of Error, filed May 18, 1914.
 12. Order Allowing Writ of Error and Staying

*Page-number appearing at foot of page of original certified Record.

Sentence and Execution, etc., filed May 18, 1914.

13. Writ of Error, filed May 18, 1914, both original and copy, and Admission of Service thereon by Clerk of District Court on said date.

14. Return to Writ of Error.

15. Bond for Costs on Writ of Error to the District Court of the United States for the Northern District of California, filed May 18, 1914.

16. Admission of Service of Petition for Writ of Error, Writ of Error, Order Allowing Writ of Error, and Cost of Bond by Special Assistants to the Attorney General, filed May 18, 1914.

17. Citation on Writ of Error, filed May 18, 1914, with Admission of Service thereon by Special Assistants to the Attorney General, both original and copy. [2]

18. Assignment of Errors, filed May 18, 1914.

19. Stipulation and Order Extending Time for Defendants to Prepare, Serve and File a Bill of Exceptions and for Stay of Execution of Judgment, filed April 17, 1914.

20. Stipulations and Orders Extending Time for Defendants to Prepare, Serve, Settle and File Their Bill of Exceptions, filed May 29, 1914, June 23, 1914, July 31, 1914, August 13, 1914, September 1, 1914, September 15, 1914, September 30, 1914, October 15, 1914, November 13, 1914, November 30, 1914, December 15, 1914, and January 15, 1915.

21. Bill of Exceptions, filed January 19, 1915, and Order Settling and Allowing the Same.

22. Stipulations and Orders Enlarging Time to File Record and Docket Case on Writ of Error, filed

September 15, 1914, September 30, 1914, October 15, 1914, November 14, 1914, November 30, 1914, December 15, 1914, January 15, 1915, January 19, 1915, and February 18, 1915.

23. Stipulation and Order Continuing Time for Settlement of Defendants' Bill of Exceptions to and into July term, 1914, filed May 29, 1914, and Stipulation and Order Continuing Time for Settlement of Defendants' Bill of Exceptions to and into November term, 1914, filed October 28, 1914.

24. Stipulation and Order (filed January 19, 1915,) providing that certain Exhibits therein named be Transmitted to the Circuit Court of Appeals in a Volume Separate from, but to be regarded as a Part of, the Bill of Exceptions.

25. Substitution of Attorneys, filed October 30, 1914.

26. This Praeclipe.

Dated at San Francisco, California, February 24, 1915.

STANLEY MOORE,
PETER F. DUNNE,

Attorneys for Defendants, James B. Smith, F. C. Mills and E. H. Mayer. [3]

[Endorsed]: Filed Feb. 24, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [4]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

(Indictment.)

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday of November in the year of our Lord one thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

JOHN L. HOWARD, JAMES B. SMITH, J. L.
SCHMITT, ROBERT BRUCE, SYDNEY V.
SMITH, F. C. MILLS, E. H. MAYER and
EDWARD J. SMITH,

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of January, in the year of our Lord, one thousand nine hundred and four, in the State and Northern District of California, and within the jurisdiction of this Honorable

Violation
Sec. 36,
C. C. U. S. Court then and there being, did then and there wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree, together among themselves and with divers other [5] persons whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned, a corporation organized, existing and doing business under and by virtue of the laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights [6] of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed by themselves and by the Pacific Mail Steamship Company, a corporation, and by other persons and corporations whose names are to the Grand Jurors

aforesaid, unknown, and for that reason not herein stated, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam, and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; and further to defraud the United States by making, and causing to be made false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco Harbor; and to that end, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company and by the said defendants at the port of San Francisco, in the State and Northern District of California, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said [7] defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon; and to further cause fraudulent affidavits and statements to be made by the defendants and by each of

them, to the officers of the Government of the United States, and to other persons and corporations whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein stated, and to the Pacific Mail Steamship Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and engaged in the shipping and transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due the said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end, and for the purpose that the defendants, acting under the name and guise of said [8] Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first

day of January in the year of our Lord one thousand nine hundred and four, to and including the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution by said defendants during all of the times mentioned in this indictment, and was continuously in operation and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act herein-after set forth and alleged in this indictment;

And the Grand Jurors aforesaid on their oaths, aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, [9] the following entry:

"Shinyo Maru ..389.1337		
Siberia	690.1462	1080.559

Over 60.1759"

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object

thereof, the said defendant F. C. Mills, did on the ninth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Siberia.....	810.19
Andrew Kelly	40.
G. E. Foster.....	40
	890.19

Over 20.1299.”

And the Grand Jurors aforesaid, on their oaths aforesaid do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills, did, on the tenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern [10] District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Korea.....	974.448
Mathilda.....	210.145
	1184.593

Over 72.1023.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement and to effect and accomplish the object

thereof, the said defendant, F. C. Mills, did, on the fourteenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex. ‘Comanche’ Wellg.

Ac. Wellington..... 444.1270

Steamer China..... 556.1795

Over 112.525.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said [11] defendant, F. C. Mills, did, on the twentieth day of September, one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex. ‘Welington’

Ac. Off Shore Bunkers..... 107.590

“ Christian Bors..... 1597.1180

“ Off Shore Bunkers..... 16.1300

“ Solveig..... 1634.1410

Korea.....	1363	1010
Damara.....	300	1464
Nippin Maru..	1699	450
Tenyo Maru....	268	485

	3531	1169
--	------	------

Over 175.1169."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, federation, and agreement, and to effect and accomplish the object thereof, the said defendant, F. C. Mills, did, on the first day of December, one thousand nine hundred and eleven, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the [12] book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Persia.....	209	1916
Korea.....	567	1492

Over 33.1478."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills, did, on the sixty day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the engineer of the "Shinyo Maru," whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the engineer

on the said steamship "Shinyo Maru" belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said "Shinyo Maru" by the Western Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement; [13]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, one thousand nine hundred and eleven, caused to be paid to the engineer of the "American Maru," whose name is to the Grand Jurors unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce the engineer aforesaid, to refrain from disclosing to the officers of the United States, the exist-

ence and operation by said defendants of the said conspiracy, and thereby to enable said defendants to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, at divers times during the month of December, one thousand nine hundred [14] and twelve, the exact dates in said months being to the Grand Jurors aforesaid, unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, at divers times during the month of October, one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid, unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the waterfront of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance

of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, on the third day of May, one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

"I, James B. Smith, Vice-President & Stockholder, Western Fuel Company, do solemnly swear that the [15] merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company, between Jany. 27 & February 15-11; and that no other certificate of delivery covering the above merchandise has been issued by me.

JAMES B. SMITH,
Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,
Notary Public in and for the City and County of San
Francisco, California.

Commission expires April 14, 1913."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,
United States Attorney. [16]

Names of Witnesses Appearing Before Grand
Jury: W. H. TIDWELL.

[Endorsed]: A True Bill. Walter N. Brunt, Foreman Grand Jury. Presented in Open Court and Filed Feb. 27, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [17]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday the 31st day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WM. C. VAN FLEET, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

(Arraignment and Plea of Defendants.)

Each of the defendants herein being present in open court with their counsel, on motion of the U. S. Atty., they were called for arraignment; and thereupon duly arraigned upon the Indictment herein against them, and each of said defendants then and there plead not guilty to the Indictment herein, which said plea was by the Court ordered and is hereby accordingly entered. Further ordered that the trial of this case be, and the same is hereby, set for May 20, 1913. It appearing that the defendants are under

bail on another Indictment, by the Court ordered that they be permitted to go on their own recognizance as to this Indictment. [18]

[Minutes of Trial, December 9, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday the 9th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

Defendants herein with their counsel, Messrs. E. J. McCutchen, Stanley Moore, Samuel Knight, Warren Olney, Jr., A. P. Black, J. R. Pringle and Peter F. Dunn; Messrs. Matt I. Sullivan and Theo. Roche for the Government, being present in open court, by the Court ordered that the trial of this case do now proceed.

The following named jurors were duly drawn, sworn to answer questions as to their qualifications, and disposed of as follows:

George Boyd, excused for cause upon challenge of Government. Martin O'Connell, passed. Robert G. Hooker, excused for cause on challenge by Govern-

ment. R. E. Herdman, passed. Joseph Gallagher, passed and excused upon peremptory challenge by defendants. A. C. Christianson, passed. John T. Gilmartin, passed and excused upon peremptory challenge by the Government. C. A. Doss, passed. Fred. Becker, passed. Ernest R. Folger, excused for cause on challenge of Government. A. S. Ferguson, [19] excused for cause on challenge of Government. John H. Masterson, passed. E. H. Tryon, excused for cause on challenge of Government. Charles R. Nauert, passed. Thos. A. Burns, excused for cause on challenge of defendant. George T. Page, excused for cause on challenge of Government. Thos. C. Maher, passed. Wm. F. Murray, passed. Charles K. McIntosh, passed. John Reid, excused for cause on challenge of Government. William K. Beans, passed. B. G. Allen, passed. Further trial continued until to-morrow at 2 o'clock P. M. [20]

[Minutes of Trial, December 10, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 10th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government and jurors drawn and called to the box, being present in open court, the further trial of this case was resumed. The following jurors were excused: John H. Masterson, for cause upon challenge by the Government: Wm. F. Murray, excused by consent: The following jurors were then drawn and sworn to answer questions as to their qualifications and disposed of as indicated opposite their respective names:

J. M. Taft passed. Perry Eyre, excused upon challenge by the Government for cause. Charles K. McIntosh, heretofore drawn and examined, was excused for cause on challenge of the Government. Carl W. Martin, excused for cause upon challenge by the Government. Geo. W. McNear, excused for cause on challenge of Government. L. P. Bolander, passed. R. H. Gatley, passed. A. C. Christianson, heretofore drawn and examined, excused upon peremptory challenge by the Government. H. L. Stillwell, excused for cause upon challenge of the Government. C. S. Fletcher, excused for cause upon challenge of the Government. T. Carry Friedlander, excused [21] for cause on challenge of Government. F. H. Babb, passed. C. A. Doss, heretofore drawn and examined, excused on peremptory challenge of defendants.

The present panel of jurors being now exhausted, by the Court ordered that the United States Marshal summon 40 persons qualified to serve as trial jurors to be in attendance on Friday morning at 10 o'clock A. M. After admonishing the jurors in the box, the

Court excused said jurors until Friday, December 12, 1913, at 10 o'clock A. M. The further trial of this case was then continued until said time. [22]

[Minutes of Trial, December 12, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government and the jury in the box being present in open court, the further trial of this case was resumed. The United States Marshal made return to the order herein directing him to summon 40 persons qualified to serve as *trial from* whom jurors shall be drawn herein. The roll of said return was called and R. C. Miller was noted absent. The following jurors summoned were for cause excused: F. C. Fisher, Chas. F. Banta, A. Fred, and J. T. Turner. The following named jurors were drawn, sworn to answer questions touching their qualifications to serve as jurors and disposed of as set forth opposite their respective names, viz.: .

John H. Bromberger, passed. J. M. Taft, heretofore passed and examined, excused on peremptory challenge by the Government. H. Weeks, excused on challenge for cause by the Government. Wm. W. Westover, excused on challenge for the Government. F. H. Babb, heretofore passed and excused on peremptory challenge by the defendants. George W. Hunt, excused on peremptory challenge by the defendants. Ralph G. Williams, excused on peremptory challenge by the defendants J. A. Arnott, excused on peremptory challenge by the defendants. Martin O'Connell heretofore drawn and examined, [23] excused on peremptory challenge by the defendants. Chas. Hewitt, excused on peremptory challenge by the Government. Chas. R. Nauert, heretofore drawn and examined, excused for cause on challenge of the Government. J. F. Logue, excused on peremptory challenge by the defendants. Henry Hufschmidt, excused on peremptory challenge by the Government. Joseph Court excused on peremptory challenge by the defendants. J. W. Brockmann, passed. Joseph Stockler, passed. H. L. Young, excused on peremptory challenge of the defendants. L. J. Borie, excused for cause on peremptory challenge by the Government. J. M. Gregory, excused on challenge for cause by the defendants. P. W. Treacy, passed. William Long, passed.

The following named jurors were duly accepted, sworn and impanelled to try this case, viz.: R. E. Herman, Fred. Becker, Thomas C. Maher, William K. Beans, B. G. Allen, L. P. Bolander, R. H. Gatley,

John H. Bromberger, J. W. Bockman, Joseph Stackler, P. W. Treacy and William Long.

The remaining jurors summoned by the U. S. Marshal, excused from further attendance. The jury after being duly admonished, were excused until Monday, December 15, 1913, at 10 o'clock A. M., and the further trial of this case was continued until that time. [24]

[Minutes of Trial, December 15, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case being present in open Court, the further trial of this case was resumed. On motion of Stanley Moore, Esqr., and the statement that defendant J. L. Schmitt on account of his physical condition asked permission to absent himself during the trial and that he waived all objection, and all other defendants waived

ing any objection and counsel for the Government consenting thereto, by the Court ordered that said permission be, and the same is hereby, granted. Further ordered that all witnesses be excluded from the courtroom during the trial of the case, except witness Tidwell. Mr. Wulivan then stated the case to the court and jury, and thereupon Warren Olney, Jr., made reply opening statement in behalf of defendants. Mr. Roche called Milton M. David, Hugh Donigan, who were each duly sworn and examined on behalf of the Government, and introduced in evidence certain exhibits, which were marked United States Exhibits, number 1 to 8 inclusive. Further trial continued until to-morrow at 10 o'clock A. M.

[25]

[Minutes of Trial, December 16, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case,

being present in open court, the further trial of this case was resumed. Witness Bly for the Government permitted to leave the State to return and be present on December 22, 1913. Mr. Roche recalled Hugh Donigan for further examination and called Thomas H. Selvage, C. C. Dickson, and D. C. Norcross, who were each duly sworn and examined for the Government. The United States introduced certain exhibits, which were marked U. S. Exhibits 9 to 20, inclusive. The defendants introduced certain exhibits which were marked Defendants' Exhibits "A" to "I," inclusive. The further trial of this case was then continued until to-morrow at 10 o'clock A. M.

[26]

[Minutes of Trial, December 17, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this

case was resumed: Mr. Roche called U. G. Edwards, Guy M. Watkins, F. B. Winebrenner, who were each duly sworn and examined on behalf of the Government and recalled D. C. Norcross, and introduced in evidence certain exhibits, which were marked United States Exhibits 21 to 99, inclusive. The further trial of this case was then continued until to-morrow at 10 o'clock A. M. [27]

[Minutes of Trial, December 18, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 18th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES**vs.****JOHN L. HOWARD et al.**

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled D. C. Norcross, who was further examined and introduced in evidence certain exhibits which were marked U. S. Exhibits numbered 100 to 122, inclusive. The further trial was then continued until to-morrow at 10 o'clock A. M. [28]

[Minutes of Trial, December 19, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 19th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore recalled D. C. Norcross for further cross-examination. The Government then called G. L. Hahn and W. H. Tidwell, who were each duly sworn and examined for the Government, and introduced in evidence certain exhibits which were marked U. S. Exhibit No. 123. The further trial was thereupon continued until Monday, December 22, 1913, at 10 o'clock A. M.

[29]

[Minutes of Trial, December 22, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 22d day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the trial of this case was resumed. Mr. Roche called Daniel J. Moyhihan, who was sworn and examined on behalf of the Government, and recalled W. H. Tidwell and called W. H. Dougherty, who was duly sworn and examined on behalf of the Government, and recalled D. C. Norcross and W. H. Tidwell, who were each further examined, and introduced in evidence certain exhibits, which were marked United States Exhibits 123 to 127, inclusive. The further trial of this case was thereupon continued until to-morrow at 10 o'clock A. M. [30]

[Minutes of Trial, December 23, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 23d day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidewell, who was further examined. The Court thereupon adjourned until January 5, 1914, at 10 o'clock A. M. The Government introduced exhibit #128, for identification. [31]

[Minutes of Trial, January 5, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 5th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche called Wm. Chisholm, who was duly sworn and examined on behalf of the Government, and recalled D. C. Norcross and W. H. Tidewell for further examination, and introduced in evidence exhibits marked 129 and 130. The further trial of this case was then continued until to-morrow morning at 10 o'clock A. M.

By the Court further ordered that the U. S. Marshal pay the following named persons the amounts set opposite their respective names, for their mileage and attendance as witnesses on behalf of the Government in this case, viz.:

Tong Bellish	\$ 3.
T. C. Sawdon.....	3.
Robert Jansen	29.30
Harry Wyrick	4.80
Robert Sass	27.
Philip Genesay	27.
Chauncey M. St. John.....	27.
F. B. Winebrenner.....	115.
W. L. Bunker.....	71.80
Chas. Fix	3.
Philip Genesay	3.
Robert Jansen	4.10
James Balestra	3.
Henry Nelson	30.
Tony Bellish	27.
Dan Pallas	27.
Wm. Mainland	27.
U. G. Edwards	110.69
Edward Powers	27.
Milton M. David.....	3.
Ed. Powers	3.
B. H. Tietjen.....	27.
D. G. Powers.....	27.
Antone Lombardo	24.
James Balestra	30.40
A. H. Freund.....	29.
Jos. Bley	21.
A. J. Paulsen.....	15.
Bud. Hopkins	3.
Antone Lombardo	3.
D. G. Powers.....	3.
Wm. Mainland	3.

Dan Pallas	3.
Thos. T. Sawdon.....	27. [32]
W. L. Bunker.....	48.
N. K. Wills.....	110.70
Henry Nelson	3.
Robert Sass	3.
Chauncey M. St. John.....	3. [33]

[Minutes of Trial, January 6, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 6th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidwell for further examination, and pending his examination, the further trial of this case was continued until to-morrow at 10 o'clock A. M. [34]

[Minutes of Trial, January 7, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 7th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

The defendants herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present, in open court, the further trial of this case was resumed. W. H. Tidwell was recalled for further cross-examination, and thereupon, the further trial of this case was continued until tomorrow at 10 o'clock A. M. [35]

[Minutes of Trial, January 8, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 8th day of Janu-

ary, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, and the counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidwell for further examination, and called Michael Costello, Harry Cooper, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled W. H. Tidwell, and called David G. Powers, who was duly sworn and examined as a witness on behalf of the Government. The further trial of this case was then continued until to-morrow at 10 o'clock A. M. [36]

[Minutes of Trial, January 9, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 9th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled David G. Powers for further examination. The further trial continued until January 12, 1914, at 10 o'clock A. M. [37]

[Minutes of Trial, January 12, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore called

David G. Powers for further cross-examination. The further trial was then continued until to-morrow at 10 o'clock A. M. [38]

[Minutes of Trial, January 13, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Tuesday, the 13th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche called Edward Powers, who was duly sworn and examined as a witness on behalf of the Government. The case was then continued until to-morrow at 10 o'clock A. M.
[39]

[Minutes of Trial, January 14, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Edward Powers was recalled for further cross-examination. Mr. Roche then called D. C. Norcross for further examination and called J. W. Smith, who was duly sworn and examined on behalf of the Government. The further trial was then continued until to-morrow at 10 o'clock A. M. [40]

[Minutes of Trial, January 15, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San

Francisco, on Thursday, the 15th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled J. W. Smith for further examination and called Joseph Waterdahl and E. E. Enlow, who were each duly sworn and examined on behalf of the Government. The further trial was thereupon continued until tomorrow at 10 o'clock A. M. [41]

[Minutes of Trial, January 16, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 16th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein on trial with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. E. E. Enlow was recalled for further cross-examination. Mr. Roche then called Samuel Griffin, W. L. Bunker and Robert Sass, who were each duly sworn and examined on behalf of the Government. The further trial was then continued until Monday, January 19th, 1914, at 10 o'clock A. M. [42]

[Minutes of Trial, January 19, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Robert Sass recalled for further examination. Mr. Roche then called Phillip Ganassi, John Belestra, Tony Belish and Thomas T. Sandon, who were each duly sworn and examined as witnesses on behalf of the Government. The further trial of the case was then continued until to-morrow at 10 o'clock A. M. [43]

[Minutes of Trial, January 20, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 20th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case being present in open court, the further trial of this case was resumed. Mr. Roche called J. T. F. Burns, Frank Kenna, William G. Read, J. F. Barfield, Arnold H. Freund, Albert Ernest Aitken,

William J. Delancy, J. L. Bley, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled Michael J. Costello for further examination. The further trial of the case was continued until to-morrow at 10 o'clock A. M.
[44]

[Minutes of Trial, January 21, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 21st day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOÖLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Michael Costello was recalled for further examination. Mr. Roche called R. Gunderson, Andrew Antzen, Daniel Lairetzen, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled D. C. Norcross for further examination, and called William S. Miller, Edmund M. Atkinson, Charles H. Blinn, Charles T. Cook, Budd. Hopkins, who were each duly

sworn and examined as witnesses on behalf of the Government, and recalled Michael Costello and D. C. Norcross for further examination. The Government here announced the close of its case, and thereupon, the further trial was continued until Monday, January 26, 1914, at 10 o'clock A. M. [45]

[Minutes of Trial, January 23, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 23d day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

On motion of Matt I. Sullivan, Esqr., Special Assistant to the Attorney-General, and it being made to appear that defendant John L. Howard herein is now deceased, by the Court ordered that the indictment herein be, and the same is hereby dismissed as to said defendant. Mr. McCutchen, Esqr., on behalf of defendants Joseph L. Schmitt and Robert Bruce, made a motion that case be taken from the jury as to said defendants, and that said defendants be discharged as to this indictment. Mr. Samuel Knight, Esqr., made a like motion on behalf of defendants

J. B. Smith, Edward J. Smith, F. C. Mills and E. H. Mayer, and Mr. Peter F. Dunn, Esqr., made a like motion on behalf of defendant Sydney V. Smith, and after hearing argument of respective counsel, the further hearing of this case was continued until tomorrow at 2 o'clock P. M. [46]

[Minutes of Trial, January 24, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday the 24th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The further hearing of the motions to take this case from the jury and to discharge the defendants, this day came on, and after hearing Mr. Sullivan on behalf of the United States, by the Court ordered that this case, as to defendants Robert Bruce, J. L. Schmitt and Sydney V. Smith, be, and the same is hereby, taken from the jury, and said defendants discharged as to the indictment herein against them. Further ordered that the motion as to defendants James B. Smith, F. C. Mills and E. H. Mayer and Edward J. Smith, be, and the same is hereby, denied,

to which ruling of denial an exception was duly taken and entered. [47]

[Minutes of Trial, January 26, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants herein on trial with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore called Arthur Mullan, Frank Wilson, Andrew Rocca, A. J. Schultz, W. R. Olinder, who were each duly sworn and examined, on behalf of defendants. The further trial of the case was then continued until to-morrow at 10 o'clock A. M. [48]

[Minutes of Trial, January 27, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday,

the 27th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. W. R. Olinder was recalled for further examination. Frank Wilson recalled for further examination. Mr. Moore called Westley Ewing, Fred. Tietjen and John Galloway, who were each duly sworn and examined on behalf of defendants, and recalled David Powers for further examination. The further hearing of the case was then continued until to-morrow at 10 o'clock A. M.

[49]

[Minutes of Trial, January 28, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. The defense called Joseph H. Desmond, John Thos. Linehan, Lawrence Brannan and Thos R. Stockett, who were each duly sworn and examined as witnesses for defendants. By the court ordered that the United States Marshal furnish a suitable conveyance, at the expense of the United States, to take the Court and jury to view the property of the Western Fuel Company, located in this City and County, at 10 o'clock A. M. to-morrow.

The defendants introduced certain exhibits which were marked Defendants' Exhibits "X," "Y," "Z," "AA" and "BB," respectively. The case was then continued until tomorrow at 10 o'clock A. M. [50]

[Minutes of Trial, January 29, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 29th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the jury, defendants, Court and counsel visited the property of the Western Fuel Company, and the further trial of the case was continued until to-morrow at 10 o'clock A. M. [51]

[Minutes of Trial, January 30, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 30th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants herein on trial, with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Olney recalled Thos. R. Stockett, and called Edward Park, who was duly sworn and examined for defendants. The de-

fendants introduced certain exhibits, which were marked Defendants' Exhibits "CC" to "FF," inclusive. The case was continued until February 2, 1914, at further trial. [52]

[Minutes of Trial, February 2, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 2d day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case being present in open court the further trial of this case was resumed. Edward Par and Fred. Tietjen were each recalled for further examination. Mr. McCutchen called S. W. Parr, who was duly sworn and examined as a witness on behalf of the defendants. Defendants introduced certain exhibits, which were marked Defendants' Exhibits "DD," "EE," "FF" and "GG" respectively. The further trial of the case was continued until to-morrow. [53]

[Minutes of Trial, February 3, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 3d day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. S. W. Parr and D. C. Norcross were recalled as witnesses and further examined. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. The defendants introduced a certain exhibit which was marked Defendants' Exhibit "HH." [54]

[Minutes of Trial, February 4, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 4th day of February, in the year of our

Lord one thousand nine hundred and fourteen.
Present: The Honorable M. T. DOOLING,
Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. S. W. Parr was recalled for further examination. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. [55]

[Minutes of Trial, February 5, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 5th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to

try this case, being present in open court, the further trial of this case was resumed. Mr. Olney called E. E. Sommermeier, J. C. Brannan, who were each duly sworn and examined as witnesses on behalf of defendants, and recalled E. E. Sommermeier for further examination. The Government introduced a certain exhibit which was marked U. S. Exhibit #163. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. [56]

[Minutes of Trial, February 6, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 6th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. S. Knight called Ernest Kroger and David M. Folsom, who were each duly sworn and examined as witnesses on behalf of the defendants. The further trial was then continued until February 9, 1914. [57]

[Minutes of Trial, February 9, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 9th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. David M. Folsom was recalled for further examination, and the defense called Geo. S. Bohart, Henry Rosenfeld and H. C. Richards, who were each duly sworn and examined as witnesses on behalf of the defendants. The further trial was then continued until to-morrow at 10 o'clock A. M. [58]

[Minutes of Trial, February 10, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday,

the 10th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES
vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Henry Rosenfeld was recalled for further examination. Defendants called Herbert Stone, Robert Husband, James J. McNamara, R. P. Jensen, Wm. Mainland, Geo. F. Morens, C. P. Caruthers, Edward J. Smith, H. Mayer who were each duly sworn and examined on behalf of defendants, and recalled Fred Tietjen for further examination. The further trial was then continued until to-morrow, at 10 o'clock A. M. [59]

[Minutes of Trial, February 11, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 11th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. W. H. Tidwell was recalled for further examination. The defense called Warren Olney, Jr., and Arthur O'Leary, who were each duly sworn and examined as witnesses on behalf of the defendants. The Government recalled John Galloway, Wm. Chisholm for further examination. Mr. Moore called Frederick C. Mills, who was duly sworn and examined in behalf of defendants. The further trial of the case was then continued until Friday, February 13, 1914, at 10 o'clock A. M. [60]

[Minutes of Trial, February 13, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 13th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Moore called Joseph H. Mayer, Michael Carroll, James B. Smith, who were each duly sworn and examined on behalf of defendants and recalled C. P. Carothers for further examination. The defense here announced that it rested. The Government called Albert Lackett, George W. Brown, E. H. Montell, Geo. B. Richardson, Symes H. Hunt, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled Robert Sass, James Bolestra, Geo. W. Brown, D. C. Norcross, Edward Powers. The defense called Frank J. Foran, who was duly sworn and examined on behalf of the defendants. The further trial was then continued until February 16, 1914, at 10 o'clock A M. [61]

[Minutes of Trial, February 16, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 16th day of February, in the year of our

Lord one thousand nine hundred and fourteen.
Present: The Honorable M. T. DOOLING,
Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Defendants introduced a certain exhibit which was marked "TT." The case was then argued by Theo. J. Roche for the Government and Stanley Moore on behalf of defendants, and thereupon, the further trial was continued until to-morrow at 9 o'clock A. M. [62]

[Minutes of Trial, February 17, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 17th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the trial of this case was resumed. The case was further argued by Mr. McCutchen on behalf of defendants and Mr. Sullivan closed for the Government. The Court charged the jury, who at 3:50 o'clock P. M. retired to deliberate upon their verdict. By the court ordered that the U. S. Marshal furnish said jurors and two bailiffs with meals at the expense of the United States. At 12:05 A. M., February 18, 1914, the said jurors returned into court and upon being asked if they had agreed upon a verdict, answered in the affirmative and returned the following verdicts in writing, which were by the court ordered and are hereby recorded, viz.:

“We, the Jury, find J. L. Schmitt, Robert Bruce and Sydney V. Smith, the defendants at the bar, not guilty. Thomas C. Maher, Foreman.”

“We, the jury, find Edward J. Smith, the defendant at the bar, not guilty. Thomas C. Maher, Foreman.” [63]

“We, the jury, find James B. Smith, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman.”

“We, the jury, find F. C. Mills, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman.”

“We, the jury, find E. H. Mayer, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman.”

By the Court ordered that Saturday, February

21st, 1914, be, and the same is hereby, fixed as the time for pronouncing judgment herein. [64]

In the District Court of the United States, for the Northern District of California, First Division.

No. 5233.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES B. SMITH et al.,

Defendants.

Proposed Bill of Exceptions.

BE IT REMEMBERED that on the ninth day of December, A. D. 1913, at a stated term of the District Court of the United States for the Northern District of California, First Division, the above-entitled cause came on regularly for trial before Honorable Maurice T. Dooling, United States District Judge, presiding; Matt. I. Sullivan, Esq., and Theodore J. Roche, Esq., Assistants to the Attorney General of the United States, appearing for the plaintiff, and Edward J. McCutchen, Esq., and Warren Olney, Jr., Esq., of the firm of McCutchen, Olney & Willard, Stanley Moore, Esq., Samuel Knight, Esq., A. P. Black, Esq., of the firm of Black & Clark, and Peter F. Dunne, Esq., of the firm of Morrison, Dunne & Brobeck, appearing for the defendants.

Thereupon, a jury was regularly empaneled and sworn according to law, and opening statements having been made to the jury by counsel for the prosecution and for the defendants, respectively, the evi-

dence hereinafter following was introduced and the following proceedings occurred: [65—1]

[**Testimony of Milton M. Davis, for Plaintiff.]**

MILTON M. DAVIS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am a Deputy County Clerk of the City and County of San Francisco, and have brought with me and have here a certified copy of the Articles of Incorporation of the Western Fuel Company produced by me from the office of the County Clerk of said City and County.

(Said Articles of Incorporation were here introduced in evidence as United States Exhibit Number 1, "for the purpose of showing there is such a corporation, and the purposes for which the corporation is formed, and for any purpose that appears therein, in so far as it bears upon any of the persons whose names are signed to it, and who are defendants here.")

Counsel for the plaintiff directed the jury's attention to the incorporators whose names appear signed to said Articles of Incorporation which is in words and figures as follows:

[**U. S. Exhibit No. 1—Articles of Incorporation of Western Fuel Co.]**

ARTICLES OF INCORPORATION
of

WESTERN FUEL COMPANY.

KNOW ALL MEN BY THESE PRESENTS:
That we, the undersigned, a majority of whom are

citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California. [66—2]

AND WE HEREBY CERTIFY,

FIRST. That the name of said Corporation shall be

WESTERN FUEL COMPANY.

SECOND. That the purposes for which it is formed are

1st. To purchase, own, hold, improve, manage, exchange and sell, rent lease, hire, and deal in real property of every description, including mines, mining claims and mining rights of every nature whatsoever, in California or elsewhere; to buy, sell, own, hold and deal in personal property of all kinds.

2d. To purchase, own, sell and deal in shares of stock and bonds and obligations of public and private corporations, mortgages, pledges and securities of all kinds.

3d. To lend money with or without security and to take all kinds of deeds of trust, mortgages, pledges and securities of real and personal property to secure loans or advances made by it.

4th. To buy, sell and deal in coal, coke, merchandise of all kinds, and to build, buy, own, sell, hypothecate and operate all kinds of steamships, vessels boats and barges.

5th. To borrow money on notes, deeds of trust or mortgages of real property or pledges of personal

property and on stocks, bonds and securities of all kinds.

6th. To engage in mining, to construct, build, buy, own, and operate all kinds of public and private improvements, such as bridges, ferries, wharves, chutes, piers, canals, ditches for draining, agricultural, mining, navigation and other purposes.

7th. To acquire by appropriation, purchase and use [67—3] water and water rights and to sell and lease water for domestic, manufacturing, mining, irrigation and other purposes.

8th. To own, purchase, sell and operate saw mills and planing mills; to carry on and conduct the lumber business in all its branches.

9th. To engage in the business of conducting warehouses.

10th. To generate, sell and lease electricity and electric and water power and to engage in the business of supplying electric and water power and electric lighting to others.

11th. To pass and make by-laws for the regulation of the sale and transfer of the stock of the corporation by providing that no such stock shall be sold by any stockholder or assigned or transferred on the books of the corporation until and unless the stock so sold shall have been first offered for purchase to the other stockholders, and giving power to the Board of Directors at any time in its discretion to rescind any such by-law.

12th. To transact any and all kinds of business in which natural persons may lawfully engage.

THIRD. That the place where the principal

business of said corporation is to be transacted is San Francisco, California.

FOURTH. That the term for which said Corporation is to exist is Fifty years, from and after the date of its incorporation.

FIFTH. That the number of Directors or Trustees of said Corporation shall be five, and that the names and residences of Directors or Trustees, who are appointed for the first year, and to serve until the election and qualification of such officers are as follows, to wit: [68—4]

Names.	Whose Residence is at.
John L. Howard,	Oakland, California.
James B. Smith,	San Francisco, California.
John C. Wilson,	San Francisco, California.
Joseph L. Schmitt,	San Francisco, California.
Sidney V. Smith,	San Francisco, California.

SIXTH. That the amount of the Capital Stock of said Corporation is One Million, Five Hundred Thousand Dollars, and the number of shares into which it is divided is Fifteen Thousand of the par value of One Hundred Dollars each.

SEVENTH. That the amount of Capital Stock which has been actually subscribed is Twenty-five Hundred Dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
John L. Howard,	Five	Five Hundred Dollars.
James B. Smith,	Five	Five Hundred Dollars.
John C. Wilson,	Five	Five Hundred Dollars.
Joseph L. Schmitt,	Five	Five Hundred Dollars.
Sidney V. Smith,	Five	Five Hundred Dollars.

IN WITNESS WHEREOF, we have hereunto set our hands this 12th day of December, A. D. 1902.

JOHN L. HOWARD.

JAMES B. SMITH.

JNO. C. WILSON.

JOSEPH L. SCHMITT.

SIDNEY V. SMITH.

[69—5]

(Here follows in due and regular form a notary public's certificate of acknowledgment of the execution of said Articles of Incorporation by the above signers thereof; and a certification by the County Clerk of the City and County of San Francisco that "the foregoing" is "a full, true and correct copy of the original Articles of Incorporation of Western Fuel Company filed in my office on the 12th day of December, A. D. 1902"; and the usual endorsements in due and regular form regarding filing and recording by the Secretary of State of the State of California and the County Clerk of the City and County of San Francisco.) [70—6]

[**Testimony of Hugh Donegan, for the Government.**] [70—6]

HUGH DONEGAN, a witness called for the United States, and sworn, testified as follows:

— Direct Examination by Mr. ROCHE.

I am now, and have been for about twenty years last past, a civil engineer and surveyor and for a number of years have been engaged in the practice of my profession in the City and County of San Francisco, where I now reside.

For some time I have been familiar with the Fol-

(Testimony of Hugh Donegan.)

som Street Bunker or Dock, and about ten days ago I went upon that dock for the purpose of making plans or measurements of the superstructure thereon. On that and subsequent occasions I made measurements of said superstructure, including the coal bunkers.

I have made a plat or diagram of one of the hoppers located on that superstructure.

(A so-called "larger diagram" representing the top of the coal bunkers upon the Folsom Street Dock was here placed in front of the jury. This diagram was eventually marked United States Exhibit Number 2.) The measurements for this diagram of the bunkers were made under my supervision and the diagram itself was drawn or platted in my office and under my supervision. The scale is 10 feet to 1 inch and the diagram is drawn to scale. It is 35 feet from the level of the plank wharf to the top of the rail or track upon which cars are operated on top of the bunkers. The wharf itself is about 7 feet above water level. I ascended the bunkers by stairways or steps located upon the north side of the wharf, but I do not know how many such stairways there are.

The length of the bunkers east to west is approximately 530 feet. The dock itself proceeds in a northeasterly [71—7] direction out into the Bay. The width of the bunkers is 40 feet and 9 inches.

There are three tracks on top of the bunkers which, together with the switches and leads, are located as represented upon the diagram now before

(Testimony of Hugh Donegan.)

the jury (United States Exhibit Number 2).

There are two bunkers which may be designated the inshore bunker and the offshore bunker on the dock. The offshore bunker occupies a little less than the easterly half of the dock reaching back approximately 230 feet in a westerly direction from the east end of said dock. The offshore bunker is divided into twenty compartments or pockets each represented by an arrow upon the diagram (United States Exhibit Number 2). The dip or slant of these pockets is offshore and by the compass in a southeasterly direction. There is also a pocket proceeding in a northeasterly direction indicated by the arrow point. There are also three pockets of the offshore bunker which dip or slant in a northerly direction, these being the pockets for screening. The width of each of these pockets east to west is approximately 10 feet. I did not measure, and do not know, the depth of these pockets. The partitions in the offshore bunkers forming the pockets or compartments reach right up to the top of the bunkers, that is to say, to the bottom of the rail or track which is laid upon the bunkers. That is true of all the pockets of the offshore bunkers.

The inshore bunker has five pockets. It occupies the entire dock for a distance of 530 feet in an easterly direction from the easterly end of the dock, and including the whole of said dock excepting such portion thereof as is occupied by the offshore bunker.

The distance between the westerly end of the off-

(Testimony of Hugh Donegan.)

shore [72—8] and the westerly end of the inshore bunker measures about 288 feet 6 inches. The lengths of the respective pockets or compartments of the inshore bunker, measuring in each case east to west, are as follows: 130 feet for the first, 60 feet for the second, 60 feet for the third, 20 feet for the fourth, and 18 feet and 6 inches for the fifth. These compartments or pockets dip or slant in a north-easterly direction. Immediately underneath the chutes attached to each of these pockets is the level planking of the wharf for the use of wagons.

Referring now to a typical section designated AB upon the diagram of the inshore bunker, I point out six rails, two to each track. AB represents a cross section taken through the whole body of the superstructure from the water level up to the rails supporting the hopper a portion of it is a representation of a compartment of the inshore bunker.

There is a walk or passageway (indicated by coloring on the diagram) about 4 or $4\frac{1}{2}$ feet wide upon the north side of the top of the bunkers, which walk extends from the easterly to the westerly end of the dock. The distance between that walk and the first track proceeding in a southerly direction is 7 feet, measured from the north rail of the north track. There is no planking, flooring or decking of any kind over the space between the plank walk and the north rail of the north track. The gauge of each of these tracks is 3 feet. There is partial planking between the rails in each one of these tracks,—that is to say, there is at some points a

(Testimony of Hugh Donegan.)

firm spike planking and at other points a movable planking which can be taken out. The space between the north track and the middle track from the south rail of the north track to the north rail of the middle track was open when I visited the docks and not planked at all. That is true of the entire dock extending from the westerly to the easterly end of the dock for a distance of 530 feet, except for a very small space, and the only interruption to the open space there consists of the girders running from one side of the dock to the other. The space between the middle track numbered Track [73—9] 2 and the south track is open for the entire length except where the ties cross the switches. That is to say, except where the leads run from one track to the other. The distance between the south rail of the middle track and the north rail of the south track is four feet center to center of rail and is open except for a foot that you have to take off for the cap. The distance between the two rails of the south track is planked down to a point opposite the end of the screening shed, that is to say, practically to the westerly end of the offshore bunker. It is open from there on proceeding in an easterly direction to the easterly end of the dock.

(It is here conceded by counsel for the Government that, of course the witness refers only to the conditions which he found at the dock and bunkers when he visited them for the purpose of making the measurements for this diagram.)

(Testimony of Hugh Donegan.)

The space between the southerly rail of the south track and the southerly side of that dock was closed or covered by movable planking for part of the distance and open for part of the distance. This space is two feet six inches wide.

There is a little board walk about a foot and four inches wide upon the extreme south side of that dock and running the entire length of the wharf.

The elevation of the post or upright just underneath the letter B in Section AB is 6 feet 5 inches above the track between the rails. This post carries the rail *for the hoppers for the hopper*. That is to say, this particular post carries the south rail. The center post supports the north rail of the hopper track. Between the two rails to which I have just referred two of the three hopper tracks are located and these two tracks are the southerly tracks marked on the large diagram "2" and "3."

[74—10]

Referring now to United States Exhibit Number 3, the coal is taken up and dumped into the hopper and then it is loaded into the car. The structure located on said Exhibit 3 immediately above the words "side elevation looking south" represents the hopper looking south. If the hopper were opened it would dump coal into the car below. At the time when I was making the measurements for these diagrams the cars were actually being loaded with coal from the hoppers. The car shown on the diagram is located on the north track.

I remember seeing a scale-house upon the bunkers.

(Testimony of Hugh Donegan.)

It is marked "Office" on Exhibit 3. The elevation of the floor of the office or scale-house above the bunkers is irregular—7 feet 1 inch at one point and 6 feet 5 inches at another point. There is a window in the easterly side of the office. The scales are located within the office. There is a beam some little distance to the south of the office which is shown on the diagram.

I recall some photographs being taken on the day when I first visited the dock to take measurements. (Counsel for the plaintiff here produced certain photographs which were marked by the clerk for identification "United States Exhibits 4, 5, 6 and 7.")

The object marked "A" in Exhibit 3 represents one of the hoppers, and the object marked "Car" was a car which was located on the north track immediately north of the hopper. The structure marked "B" upon Exhibit 3 is a coal chute extending in a northerly direction. There are two coal chutes projecting out from the northerly side of these hoppers. The coal chute marked "B" on Exhibit 3 is immediately over the object designated "Car" in that exhibit. I recall some chutes extending in a northerly direction from the north side of the hopper. It is indicated in the structure marked "B" upon the diagram "Exhibit 3." There are two of these coal chutes projecting from the northerly side of each hopper. The car represented upon that structure marked "B" is in the picture standing upon the northerly track and immediately north of the hopper. [75—11]

(Testimony of Hugh Donegan.)

Referring to the day on which I visited the bunkers with Mr. Roche I recall the existence of hoppers located on the hopper tracks to which I have heretofore referred, and I remember one hopper being located a short distance east of the scale-house. I also recall that photographs were taken on that day of the conditions existing on the bunker at that time.

United States Exhibit Number 4 now shown to me is a photograph that represents the conditions on the bunker as they were on the day when I observed them. The photograph shows a hopper with two of the chutes projecting in a northerly direction and over the northerly track, and that was the first hopper from the scale-house proceeding in the easterly direction toward the easterly end of the dock. (The photograph, United States Exhibit 4, was here formally offered in evidence—no objection by the defense.)

(It was here stipulated by counsel for the plaintiff that when an objection is made and an exception taken, such exception, unless otherwise specified, shall be available to the defendants generally.)

I do not recall upon which date this photograph, United States Exhibit 4, was taken. It was about a week ago last Thursday that I first visited the bunkers to make measurements. I cannot recall what time of day it was that the photographs were taken. The coal chutes represented in the photograph are also represented upon my diagram, United States Exhibit 3, at the point extending out and over what is marked "Car."

(Testimony of Hugh Donegan.)

Elevation B upon United States Exhibit 3 represents a hopper located upon the tracks on which the hoppers are operated and can be operated from one end of the bunker to the [76—12] other, that is, from the westerly end of the dock to the easterly end. Three chutes are connected with each hopper, two on the northerly side and one dropping down underneath. A car, in order to receive coal from the chute underneath the hopper, has to be located upon Track Number 3 as laid down in United States Exhibit Number 2, which is the southerly track.

The coal is carried from the boats, which are located on the south side of the docks, in buckets and is dumped from the buckets into the hoppers. There was a boat discharging on the docks on the day on which I was there with Mr. Roche. As I have testified before, the coal is discharged from the hopper by means of the chutes projecting from the hopper in a northerly direction, but on this particular occasion the coal was being taken from the hopper by the vertical drop. The projection of each one of these chutes from the northerly side of the hopper is about 4 feet 6 inches.

Referring again to the structure marked "A" on diagram "B," I would now say that the object marked "Car," which you say I before testified was located on the northerly track, as a matter of fact represents a car located on the southerly track immediately underneath the chute below the hopper.

(A photograph is here introduced in evidence as United States Exhibit Number 8, it being conceded

(Testimony of Hugh Donegan.)

by the defendants that that photograph correctly represents the bottom of one of these hoppers, and likewise shows the existence of the chutes which descend from the bottom of the hopper. The photograph is offered for no other purpose.)

On the occasion upon which I visited the bunkers I also went into the scale-house. I remember that a photograph was taken of said scale-house. The photograph which has heretofore [77—13] been marked for identification "United States Exhibit Number 5" correctly, accurately and truly represents the location of the scale-house at the time when I was on the bunkers. (The photograph was here introduced in evidence as United States Exhibit Number 5.) The last above-mentioned photograph correctly, truly and accurately represents the condition of a certain beam or girder therein located immediately under what purports to be the scale-house as I found its condition to be on the day when I first visited the bunkers. I measured that beam. That part of the plat heretofore marked "United States Exhibit Number 2," section through CD, scale 1 inch equals 4 feet, represents that beam. The horizontal represents the girder, and its dimensions are, perpendicular 12 inches and horizontal 10 inches; the girder, running in a generally northerly and southerly direction and extending from the south floor of the scale-house to the south side of the dock. There are three tracks located underneath that beam.

I did not get inside the scale-house so cannot say where the actual scales themselves were located.

(Testimony of Hugh Donegan.)

Last Saturday I examined the structure immediately underneath the scale-house and between its floor and the tracks. There are two rods there exposed for a distance of 9 feet which descend from the floor of the scale-house to the floor of the bunker. I do not recall their dimensions.

Referring again to the beam in front of the scale-house, it is a 12 inch beam, but it measured only $10\frac{1}{2}$ inches, because it has been cut out in a rough sort of way. This portion of the beam was in appearance "roughed up," and did not appear to have been recently made as it was, weatherbeaten, it was rough. Of the three tracks that lead to the scale-house the southerly track is the one located immediately underneath that irregular line or groove in said beam. The beam is the same one that is represented in the photograph, United [78—14] States Exhibit Number 5, now introduced in evidence to show the situation and condition of the beam and the situation generally upon the photograph.

When I visited the Folsom Street dock I noticed two scales located upon the dock. The south track runs over one and the north track over the other. The scales are about opposite the scale-house and are on a level with the floor of the bunkers; that is to say, the tracks run right along upon the top of the two scales.

This Folsom Street dock continues toward the west and behind the scale-house right across the street, by a sort of bridge or tramway. It runs over to a structure on the westerly side of that street.

(Testimony of Hugh Donegan.)

The open space between the three tracks located on diagram, United States Exhibit Number 2, to which I testified a short time ago, leads into the bunkers, so that material dropping between the tracks into the spaces finds its way into the bunkers.

I do not know and did not make an examination for the purpose of ascertaining whether the compartments or pockets either of the inshore or off-shore bunkers were or were not numbered.

Screening sheds were located upon the bunkers at the point indicated by the shading, and, except for the structures already described by me, these sheds were the only structures located upon the dock. The greatest width of each is about 7 feet.

I did not take the elevation of the hoppers or their width from side to side. I simply measured from post to post. The rails upon which the hoppers are operated are supported by timbers or uprights located at intervals of about every 10 feet from the westerly end of the dock to the easterly end of the dock. Said two diagrams were thereupon offered in evidence the larger diagram as "U. S. Exhibit 2" and the smaller diagram as "U. S. Exhibit 3." [79—15]

As soon as Court adjourned yesterday I visited the Folsom Street bunkers again. I found that there are two chutes descending from the bottom of each hopper. Referring to the structure B, United States Exhibit Number 3, the object marked "Coal Chute" is one of these chutes, and the other chute adjoins it. The chute is immediately above the car.

(Testimony of Hugh Donegan.)

The measurement of the beam in front of the scale-house which I gave yesterday as 10x12, should be 6x12.

The distance between the top of the rails and the top of the sides of the car standing on the rails is 5 feet 10 inches. The distance between the top of the car and the heretofore mentioned horizontal beam at that part of the beam where it is not chewed out or worn away is 1 foot 2 inches. I did not examine the cars themselves, nor their interiors, and I do not know what kind of a bottom these cars had.

Cross-examination.

(By Mr. McCUTCHEN.)

The beam or girder which I have heretofore spoken of as extending to the south of the scale-house holds the framework for the office af the scale-house. It supports the scale-house which rests upon that beam or girder and another girder some distance from it. My understanding from observation is that the girders or beams were put there to support the scale-house. The distance between the easterly end of the scale-house shown upon my diagram and which I described yesterday, and the westerly end of the bunker, is about 10 feet 6 or 8 inches, and for that distance the space between the tracks and to either side of the tracks is solidly floored or planked. That is to say, the space for the entire distance from the [70—16] southerly side of the bunker near B to the northerly side of the bunker near C is all planked, to a distance 10 ft. 8 in. easterly of the scale-house.

There is a third rail between the two outer rails of

(Testimony of Hugh Donegan.)

the southerly, the middle and the northerly tracks, respectively, as said tracks are delineated upon my diagram.

I did not see any hoppers discharging coal into cars on the northerly tracks, and I do not know that coal is ever discharged from the hoppers into cars on the northerly tracks. The only loaded cars which I saw on the northerly track at all were those which had been switched onto that track from the middle or the southerly tracks where they had been loaded.

On the day I visited the bunkers the movable boards or planks which I have heretofore spoken of were laid just south of the southerly rail. They were not laid down to the north of the middle rail on the day on which I was there. These boards were bound together with cleats so that when they were dropped they would fill the entire space. They were so covered with coal dust that I could not tell whether they were new boards or planks.

(A photograph is here handed the witness.) This photograph is a correct representation of the bunkers, looking at them from the southerly side. The ship represented on the photograph, the "Ken Kon Maru," was discharging at the dock when I made my measurements. (It is here conceded by counsel for the plaintiff that the photograph may go in evidence as an exhibit without further identification, and it is marked Defendants' Exhibit "A.") When I was on the bunkers I was in a position where I could see the unloading of the aforementioned ship. Three of the hoppers were working and I think,

(Testimony of Hugh Donegan.)

therefore, that the ship must have had three hatches. (Counsel for the defendants here, by consent of [71—17] counsel for the plaintiff marked the hoppers on the photograph "1," "2," "3" and "4," and counsel for plaintiff stipulated that each of the figures does represent one of the four hoppers.)

(Witness is here shown another photograph. It is stipulated by counsel for the plaintiff that this is a photograph of the northerly side of the dock extending in a westerly direction from the westerly end of the dock to the yard of the Western Fuel Company on the opposite side of the street, and that, subject to correction, it is a correct representation of that which appears within it; also stipulated that the numbers "1," "2," "3" and "4" upon the photograph, represent the hoppers. The photograph is introduced in evidence as Defendants' Exhibit "B," counsel for plaintiff reserving the right of redirect examination regarding any object represented in said exhibit.)

(Witness is shown a photograph marked Defendants' Exhibit "C" for identification. Stipulated by counsel for plaintiff, subject to correction, that this photograph represents the westerly side of the scale-house; that the bunker dock heretofore referred to is behind the scale-house and the hopper represented in the photograph. The photograph was here introduced in evidence as defendants' Exhibit "C." Further stipulated by counsel for the plaintiff that the object marked "1" represents a scale-house and shows the westerly side and part of the southerly

(Testimony of Hugh Donegan.)

side of said scale-house in addition to the westerly side of the roof thereof; further stipulated that the structure marked "2" on the photograph represents the upper part of the first hopper.) The object marked "3" on the photograph is a little dynamo or electrical engine that draws the cars. (Stipulated that the window marked "4" in the photograph is a window in the office [72—18] looking south. Counsel for the plaintiff remarks that he wants the jury to understand that that photograph represents the westerly side of the scale-house that faces toward San Francisco; stipulated by counsel for defendants that that is quite true.)

If I stated yesterday that I went into the scale-house I was mistaken or the record is mistaken in that regard. I did not go into the scale-house.

(Another photograph is here shown to the witness.) This photograph correctly represents that portion of the wharf that is shown in it. (Stipulated by counsel for plaintiff that the photograph correctly represents what it purports to represent at a time when the movable or portable planks, to which the witness testified yesterday as lying at the side of the south rail of the south track as between the two tracks had been laid; stipulated also that the figure "1" which is placed to the north of the north side of the hopper represents a portion of a hopper. The photograph is introduced in evidence as Defendants' Exhibit "D.")

I do not remember on any of my visits to the

(Testimony of Hugh Donegan.)

bunkers seeing a car loaded on any other track than than the southerly track.

(Another photograph is here shown to the witness. It is admitted by counsel for plaintiff that this photograph is a representation of the western side of the scale-house looking in an easterly direction with the dock and bunkers behind the scale-house; also that the photograph shows an electrical locomotive and cars upon the southerly and the middle tracks; also that the load in the cars is supposed to be coal. The photograph is introduced in evidence as Defendants' Exhibit "E.") [73—19]

The operator on the cars stood back of the engine.

(Another photograph is here shown to the witness and is marked Defendants' Exhibit "F" for identification.) I find on this photograph the representation of a man's head almost immediately under the girders which have been referred to as supporting the office. The man is between two cars. I did not pay sufficient attention to the situation to be able to say that the man on the cars was always so stationed. Sometimes I saw two men on a train. I do not recall whether I ever saw a single man on a train who was located at any other place than between the two cars. The photograph correctly shows the cars as I saw them on the southerly and the middle track. I could not say whether I saw an operator stationed on the electric locomotive. Sometimes there were two men and I do not know exactly what position they occupied. I could not answer as to what position the

(Testimony of Hugh Donegan.)

man occupied when there was only one man on the train. Sometimes the trains came up to the scales with the locomotive in front, and sometimes with one of the cars in front. I don't recall whether or not when the trains came with one of the cars in front the operator was on the locomotive to the rear of the two cars.

(Another photograph is here shown to the witness and is introduced in evidence as Defendants' Exhibit "G.") This photograph shows the track from a point about underneath the hopper to the easterly end of the bunkers, that is to say, it shows the southerly and the middle tracks, and also a portion of one of the hoppers.

(The witness is here again shown the photograph, Defendants' Exhibit "F," for identification.) This photograph represents one of the hoppers and the northerly track for a [74-20] portion of the distance along the wharf looking to the south or southeast. That is to say, it represents the northerly and the westerly side of the hopper. (It is admitted by the prosecution that there was a man in charge of the train at the time this photograph was taken; it is admitted by the defendants that at the time this photograph was taken there was not a sufficient amount of coal loaded on any of these cars to enable the coal to come in contact with either one of the two girders; also admitted by defendants that the photograph is a representation of the westerly side of the scale-house looking east and that the dock or bunkers, concerning which evidence has been introduced,

(Testimony of Hugh Donegan.)

are located behind the scale-house and to the easterly side thereof. The photograph is here introduced in evidence as Defendants' Exhibit "F." Counsel for the defendants corrects his previous statement that these trains could not be operated unless the man was located between the two cars, asserting now that that was the way in which they were usually rather than necessarily operated.)

(Witness is here shown another photograph.) This photograph correctly represents the two hoppers to the extent that they are shown in the photograph as also the southerly and middle tracks and a portion of the northerly track. (Admitted by the prosecution that the photograph is correct for the time at which it was taken but not conceded that the portable planking is always down at the time that coal is being discharged. The photograph is introduced in evidence as Defendants' Exhibit "H.")

(The witness is here shown another photograph. Admitted by the prosecution with the reservation that the condition in which the temporary planking appears in the photograph [75—21] as not necessarily the condition in which such planking is found when the coal is being discharged, that this photograph correctly represents portions of three hoppers and likewise a portion of the southerly track. Also that the photograph shows a portion of an electric motor and a portion of a car located on the middle track. The photograph is introduced in evidence as Defendants' Exhibit "I.") The wheels of the most westerly hopper shown on this photograph are cor-

(Testimony of Hugh Donegan.)

rectly represented and there are other wheels of the same size on the other side. The rail here shown being the southerly rail of the hopper track, there is a similar rail on the north side. Counsel for the prosecution asked the jury to notice that in each of the last two above-mentioned photographs portions of the temporary planking have been removed. When I was making my measurements on the bunkers the space between the middle track and the south track was open from the westerly line of the westerly screen shed to the easterly line of the offshore bunker, a distance of 230 feet. From the westerly point that I have just described to the westerly end of the bunkers the space between the south and the middle tracks was provided with movable planking. I know that the planking was movable because sometimes when I was there the planks were taken up while at other times they were down, and at the particular time when I made this observation they were down, but at other times I saw them up.

I have known the Folsom Street wharf and bunkers for about ten years. I never was on them before. I do not know when the bunkers were placed there.

Cross-examination by Mr. DUNNE.

The name of the street from which the Folsom Street [76—22] wharf starts out into the bay is Embarcadero Street. The bunkers are built up above this plank wharf. Then comes a sort of second story on which the dump-car tracks run; then there is still a third story on which the hopper tracks

(Testimony of Hugh Donegan.)

run. There are three dump-car tracks, but only one hopper track. The offshore bunkers are receptacles for coal, and the south side of the wharf where they are located comes right down flush with the water so that you could not drive a wagon on the other side of it. When ships or barges want coal they come to these offshore bunkers. If a coal man from up town wants coal he goes to the inshore bunkers and that is why there is a plank walk to the north of the inshore bunkers. These, then, are the two classes of bunkers,—offshore and inshore, which figure in the Folsom Street bunkers. When a ship wants to discharge coal she draws up on the southerly line of the wharf. The coal is taken out of the hold of the ship, being brought up through the hatch in a bucket and dumped into a hopper which is nothing more nor less than a big coal-box or coal-scuttle on wheels. This hopper or coal-box moves up and down on wheels on the third story of the bunkers so that it can be accommodated to the relation of a given hatch of a ship. From the coal-scuttle or hopper the coal is emptied into the dump-car below, the coal passing from the hopper through the chutes. So far as my observations went the two chutes underneath the hoppers were used and never the side chutes. So far as my observation went the dump-car was always on the south track when it received coal. A car standing on the middle track could not possibly receive coal through the bottom chutes of the hoppers. The middle track is used for switching purposes. I never saw any boards or planks

(Testimony of Hugh Donegan.)

covering the space between the off track and the middle track, from the extreme westerly end of the bunkers [77—23] down to the scale-house. The place where I did see the planks down was that space south of the southerly track from the scale-house, approximately to the offshore bunkers. I do not think I ever saw a hopper doing business opposite the offshore bunkers. So far as I observed, the discharging of coal from the hoppers is all to the west of the offshore bunkers. By the girder which has been heretofore called to my attention I mean a thick timber 6x12 which is on the third story. The scale-house rests on that girder timber or cross-beam. There are two such girders. The first girder reached by the car proceeding down the track westerly is the one which Mr. Roche yesterday described as having been chewed off. Its depth is 12 inches, and it was chewed off $1\frac{1}{2}$ inches.

Redirect Examination by Mr. ROCHE.

During the last ten days I have visited the bunkers five times for the purpose of taking measurements, and the first occasion was that on which the photographs heretofore introduced in evidence by the prosecution were taken. Referring to the space shown in United States Exhibit Number 1 between the middle track and the south track from the westerly end of the offshore bunker to a point about 10 or 15 feet east of the scales, I will say that the space was open the day I was there. I won't say the space was entirely open, but it was here and there planked,

(Testimony of Hugh Donegan.)

a piece perhaps 3 or 4 feet long. I didn't observe its condition except on that particular day. Mr. Tidwell called my attention to it then. On that date the space was open.

Q. Was the space entirely open, or was it closed at intervals by the use of the temporary planking or decking? A. There was occasional planks.

This is the space to which Mr. Dunne directed my attention on cross-examination.

Referring to the space to which my attention was directed yesterday and this morning, indicated upon United States Exhibit Number 1, to the south of the south track and between the south track and the south side of the bunker and extending westerly [78—24] from the west end of the offshore bunker to a position about 10 or 15 feet east of the scales, I would say that said space was planked but that some of the planks were partially up and resting on the coal. I found the space between the two rails of the south track and the center track planked.

It is not a fact that the entire dock particularly at its western end is enclosed. I do not recall a rail fence of any kind extending practically across the dock. I have no recollection upon that subject at all.

Referring to Defendants' Exhibit "B" and refreshing my memory by looking at it, I would say that the approach to the dock upon the first story was not enclosed at any time that I passed through it. There were no obstructions to the westerly approach

(Testimony of Hugh Donegan.)

of the first floor of the dock. Teams were constantly coming in and out through there and they did not pass through a gate. I reached the upper part of the superstructure by means of a stairway located on the north side of the western approach to the dock. I recognize that stairway on Defendants' Exhibit "B" (marked by counsel "A"). The stairway leads to a door which is about flush with the floor of the bunker. The door was closed when I visited the bunkers, but not locked. I do not recall whether the door was locked on the occasion when we first visited the bunkers or not. I do have a recollection of a mode of access to the top of those bunkers other than by means of that stairway. I refer to a stairway toward the easterly end of the dock. It is in the vicinity of the screening shed. The bottom of that stairway is surrounded by a wooden fence that was open when I went through, and I did not pass through a doorway or gateway. From there I passed onto the floor of the dock underneath [79—25] the bunkers. The only two methods of reaching the upper part of the bunkers that I know of are the two which I have just mentioned. I saw no citizens of San Francisco on top of the bunker examining it at any time.

(Pointing out on Defendants' Exhibit "F" two rods, one upon either side of the north upright which apparently supports the scale-house, the witness here said that these two rods were the rods connecting with the beams in the scale-house.) I did not notice a covering of any kind upon either of these rods.

(Testimony of Hugh Donegan.)

Upon one or more of these occasions when I visited the bunkers for the purpose of making measurements, I noticed some of the temporary planking located between the off or south tracks, and the extreme south side of the bunker upon and leaning against the side of the bunker.

There is a sort of solid wall extending along the south side of the dock with an elevation of perhaps five feet. I recognize this wall in Defendants' Exhibit "H" now shown to me. The wall is immediately below the extreme south side of each of the hoppers and is in fact supported by the uprights or beams which likewise support upon their top the south rail upon which the hoppers are operated.

I observe upon the photograph marked Defendants' Exhibit "H" that some of the portable planking has been taken up and is leaning against the side of the last described wall, but when I was actually down there on the wharf the planking was pretty much down and only partially up. I did not testify a few minutes ago that on one or more of the occasions when I was on the dock I saw portions of the decking between the south track and the south wall open and leaning against the coal. What I said was that they were partially up leaning on top of chunks of coal, that is to say, the chunks were underneath and prevented the planks from dropping into place. I do not know how the chunks of coal got under this portable planking. I think coal was being discharged at the docks on almost every occasion when I visited said docks. I paid no particular attention

(Testimony of Hugh Donegan.)

[80—26] to the method in which they were discharging coal, because I was busy making measurements and keeping out of the way of the third rail. The two chutes beneath the coal-hoppers through which the coal passes into the dump-cars all project in a southerly direction, and that is the reason why it would be impossible to load any one of those cars upon any track except the southerly track.

Recross-examination by Mr. McCUTCHEN.

In addition to the two ways of gaining access to the bunkers which I have heretofore mentioned on redirect examination, there is another means of approach, namely, by the bridge which crosses the Embarcadero, once you have got on the bridge, of course.

Further Redirect Examination by Mr. ROCHE.

This bridge leads into some yard across the street. (Counsel for defendants here ask counsel for prosecution whether they are attempting to show that the bunkers of the Western Fuel Company were closed to representatives of the Treasury Department; to which the prosecution answers that they do not know and that they are simply endeavoring to show that people in general were not permitted to go upon and never see the bunkers.) [81—27]

[**Testimony of Thomas H. Selvage, for the Government.]**

THOMAS H. SELVAGE, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am and for about two years last past have been

(Testimony of Thomas H. Selvage.)

an assistant United States Attorney, and, during the incumbency of Mr. McNab as United States Attorney, had occasion to participate to some extent in the preparation of this case.

I am now and have been during all of the time of the investigation on this case familiar with the Folsom Street dock or bunkers of the Western Fuel Company. I recall visiting these bunkers three times. On one of these occasions coal was being discharged from one of the boats lying to the south of the dock. Upon one of these occasions photographs were taken within my observation and under my direction of different parts of the dock.

(A photograph marked "United States Exhibit Number 9" for identification was here shown to the witness.) That photograph represents the dock or coal bunkers of the Western Fuel Company taken from the southerly side and looking in a northeasterly direction so as to include the south side of the dock. No boat was being discharged when this photograph was taken, but the photograph shows the side of the dock at which a boat about to be discharged would be located. A barge was swinging into place at the time. The photograph correctly, truly and accurately represents that side of the dock as it appeared to my observation at the time when the photograph was taken. [82—28]

(Another photograph marked "United States Exhibit Number 10," for identification was here shown to the witness.) That photograph was taken at the same time as the last mentioned photograph. It

(Testimony of Thomas H. Selvage.)

represents the same side of the dock and it shows the barge to which I referred a moment ago. The photograph truly, correctly and accurately represents the situation as it appeared to my observation at the time the photograph was taken. (The photograph is here introduced in evidence as "United States Exhibit Number 10," and the prior photograph is likewise introduced in evidence as "United States Exhibit Number 9.")

(A photograph marked "United States Exhibit Number 14" for identification is here shown to the witness.) This photograph represents the north side of the coal-bunkers looking east. They were not discharging coal at the time on that track.

I recall the fact that the two photographs introduced above in evidence as "United States Exhibits Numbers 9 and 10" disclose no collier or other boat being discharged upon the south side of the dock. I did not see any coal being discharged there at that time.

The photograph "United States Exhibit Number 14" for identification correctly, truly and accurately represents what it purports to represent as observed by me. The camera in the case of this photograph was spotted upon the platform immediately in front of it and beside the scale-house.

In order to reach the entrance to the scale-house you have to ascend some 7 or 8 stairs which lead from the deck on the top of the bunker and close to the scales office up to the scale-house. [83—29]

(Another photograph marked "United States Ex-

(Testimony of Thomas H. Selvage.)

hibit Number 15" for identification is here shown to the witness.) This photograph was taken at the same time as the other and nearly at the same place as the last aforementioned photograph. It represents the north track and the north side of the hoppers and represents what it purports to represent accurately, correctly and truly.

(Another photograph marked "United States Exhibit Number 16" for identification, is here shown to the witness.) This photograph was taken at the same time as the others. It represents the north side of the coal-bunkers and the track looking west and shows all the tracks and the four hoppers, there having been four hoppers located upon this superstructure on the day when the photographs were taken. I never have seen more than four hoppers. The hoppers travel upon tracks elevated above the floor of the bunkers and can be stopped at any desired point over the bunkers. They run from east to west and occupy the southerly portion of the dock or bunker. This last mentioned photograph correctly, truly and accurately represents what it purports to represent as observed by me.

I do not recall any temporary flooring or decking over the inshore bunker between the middle track and the south track until you get pretty well west over said bunker. I was then familiar and am now familiar with that part of the dock located between the south rail of the south track and the extreme south side of the dock, and the condition of that part of the dock when the photographs were taken was

(Testimony of Thomas H. Selvage.)

just the same as is shown in this photograph "United States Exhibit Number 16" for identification, that is, there was no covering at all over the offshore bunkers and there were some planks resting up [84—30] against the wall on the inshore bunkers. Some of the bunkers were not covered at all and some of the planks over the bunkers that were covered were elevated somewhat upon the coal beneath them.

(A photograph marked "United States Exhibit Number 17" for identification was here shown the witness.) Portions of the portable flooring or decking were resting up against the extreme south side of the dock at the time when the photograph was taken, as is shown in this photograph.

(Another photograph marked "United States Exhibit Number 18" for identification was shown to the witness.)

This photograph was taken at the same time as the others heretofore mentioned, and correctly, truly and accurately represents what it purports to represent and which came within my observation at the time it was taken. This photograph was taken from a platform or bumper at the east end of the bunkers. The camera was located, when the photograph was made, so as to take in compartment number 22. This photograph likewise correctly represents the condition in which the wharf was at that time or in which the bunkers were at that time and just how they were exposed. The photograph was undoubtedly taken on the south side of the bunkers at the east side and looking west. (The photograph is here introduced

(Testimony of Thomas H. Selvage.)

in evidence as "United States Exhibit Number 18.")

(Another photograph marked "United States Exhibit Number 19" for identification was here shown the witness.) This photograph was taken at the same time as the others and represents that portion of the bunkers just back of or in an easterly direction from the scales looking to the east. The hopper first shown in the photograph is the first hopper. It was only a short distance east from the scales. The photograph correctly, truly and [85—31] accurately represents the situation it purports to disclose. The flooring provided for the space, appearing in the photograph between the south rail of the south track and the extreme south side of the bunker or dock, was mostly laid up against the wall. (The photograph was here introduced in evidence as "United States Exhibit Number 19." United States Exhibits Numbers 14, 15 and 16, heretofore marked for identification were at this time also introduced in evidence as United States Exhibits of the corresponding numbers.)

I am familiar with the scale-house located upon the dock immediately above the scales connected with the north and south tracks respectively. I have been inside said scale-house. We took two photographs of the interior of the scale-house. There were two scales beams therein. Those beams were located on the west side of the house. I was not in the scale-house while the coal was being weighed. The scale beams are up against the side of the scale-house as I remember it, so that there is no space in which a

(Testimony of Thomas H. Selvage.)

person can locate himself between the scales beams and said west side of the house and take weights, looking in an easterly direction down the tracks or toward the hoppers; that is to say, the person taking the weights must face around with his back immediately toward the dock and hoppers and toward the place where the coal is being loaded into the cars.

(The attention of the witness is here again called to photograph marked "United States Exhibit Number 12" for identification.) That photograph was taken at the same time as the others heretofore referred to. It represents the interior of the scale-house and the beams. The camera was facing toward the southwest. A curtain was drawn over the window immediately behind and west of the scale-house.

[86—32]

(The attention of the witness was here again directed to the photograph, United States Exhibit Number 13, for identification.) This photograph represents the interior of the scale-house and shows the scales beams and a window immediately to the west of the beams, with the curtain up. Each of the last two above mentioned photographs correctly, truly and accurately represent what they purport to represent. (Said photographs are here introduced in evidence as United States Exhibits Numbers 12 and 13.)

There is a window immediately to the south of the door on the east side of the scale-house and facing the dock and coal hoppers. I recall looking out of that window to ascertain whether one could see the

(Testimony of Thomas H. Selvage.)

scale platform from the scales-room, and I could not see it. A weigher in the scale-house facing the east instead of the west and looking through the easterly window would not be able to see beyond the first hopper. I could not see the track beneath the first hopper. I do not recall seeing any cars stationed at any time under the first hopper while I was in the scale-house. It would not be possible for a person standing in the scale-house and looking in an easterly direction to see the mouth of either one of the two chutes emerging from the bottom of the first coal-hopper, or to see the coal being dropped through the mouth of either of those chutes into a car beneath said first hopper, or to see what was being done under any of the other three hoppers.

(A photograph was here introduced in evidence as "United States Exhibit Number 20" for the purpose of showing that you could not see underneath the hopper at the time the photograph was taken. Counsel for the defendants pointed out, however, that the photograph was very imperfect. It was conceded [87—33] by counsel for the defendants that the black line running down the center of the photograph represents a part of the frame of the window.)

I did not see any persons on the bunkers examining them out of motives of curiosity or otherwise, except Mr. Tidwell and myself and the photographer. Mr. Mayer, the weigher, interfered with us in wandering freely over the bunkers. We gained access to the upper part of the bunkers by going up

(Testimony of Thomas H. Selvage.)

a stairway on the outside. The gate at the top of the stairway was not locked. I do not recall any signs indicating "no admittance."

Cross-examination by Mr. McCUTCHEON.

I first visited the bunkers, I think in May last, about two months after the first indictment was found; the next visit was two weeks later; and the third visit was later still. All the visits were within two or three weeks of each other. Mr. Tidwell and, I think, Customs Agent Smith accompanied me on the first visit. Mr. Tidwell and Photographer Perry accompanied me on the second visit. Mr. Tidwell and another officer, whose name I do not recall now, accompanied me on the third visit. I stayed about the place probably three-quarters of an hour on the first visit, and during that visit simply looked about to see the bunkers and to observe their general construction. No ship was unloading there at the time. There was a ship unloading, however, on the occasion of my last visit. The photograph, United States Exhibit Number 19, was taken in the latter part of May or the first of June. I do not recall any ship unloading at that time though they were handling coal. I do not recall observing the particular spaces between the southerly and middle tracks excepting on my visit when the photographs were taken and, therefore, cannot say whether on any of my visits [88—34] other than that visit on which I found those spaces uncovered, said spaces were covered. I was once at the bunkers when a ship was unloading. I went there to see the

(Testimony of Thomas H. Selvage.)

ship unloading and I remained on the dock most of the time. I did not notice whether the boards were in place. In answer to the question whether I am certain that I was ever upon the bunkers when a ship was being unloaded and those boards were not in place, I would say that I do not recall looking particularly at the condition of the flooring when I went there and examined the ship unloading. I went there to the bunkers with a treasury agent. Answering the question whether it does not occur to me that as a representative of the Government I would not call attention to the fact that those boards were out of place when a ship was unloading if they had been out of place, I would say that I was then particularly concerned with the ship and not with the condition of the bunkers. At the time I took these photographs I was examining the particular place and I recall the exact condition of each of the tracks. I was not there to get evidence to be used in the trial of this case, but I was there acquainting myself with the situation because I thought I would be taking part in the prosecution of this case. I was accompanied on all of my visits by Mr. Tidwell. In answer to the question whether I think it was within the possibilities that those boards could have been out of place while the ship was unloading and I not have called attention to it or have seen it, I will say that I cannot tell positively whether I did or not observe or call attention to such a situation if it existed. I think it very possible that I did observe it at the time,—that is to say, I think it possible I

(Testimony of Thomas H. Selvage.)

did observe whether or not the boards were out of place while the ship was unloading. My understanding was that these boards were intended to be used to cover different points at different times, since, according to my observation, [89—35] there were not boards enough to cover all the space at once. I refer now to that portion of the bunker occupied by the hoppers at the time my photographs were taken, and to the space between the southerly track and the middle track and between the southerly track and the bulkhead. I think there were probably boards enough to cover two-thirds of the space,—that is to say, the space between the two railroads and the southerly road and the bulkhead. I am referring, of course, to the space over the inshore bunkers because there were no coverings whatsoever for the offshore bunkers. Some of the boards were leaning up against the bulkhead and some of them were lying upon the spaces, partly covered—that is, the space would be partly covered but not altogether; but there were not sufficient planks there to cover all of the spaces. I do not know whether there were additional planks that I could not see. I am positive that there were not boards enough to cover all the spaces under all four hoppers. I did not count the boards. But I could see all the boards that were there and there were spaces still uncovered and some of them were leaning against the walls, which, if they had been turned down, they would have covered certain spaces, but there were not sufficient boards to cover the balance of the spaces. I

(Testimony of Thomas H. Selvage.)

had no difficulty, however, in seeing that there were not boards enough to cover the space between all four hoppers. I took a flashlight picture of that. (Mr. Roche here remarks that this is United States Exhibit Number 19 in evidence.)

Whether there were any Government weighers on the bunkers when the ship was unloading I cannot say because I paid no attention to the weighers. I did not notice whether there were any Government Inspectors upon the wharf at the time but there may have been for aught I know. I do not recall going into the scale-house on my visit to the dock on the occasion when a ship was discharging. I entered the scale-house a number of times on the occasion when we took the photographs,—perhaps half a dozen times on that day. This was all within a short period of time because I was directing the photographer what to do and had to go in and out. On the day on which the photographs were taken I did not look out of the south window of the scale-house in an effort to see the south track. From the position the weighers [90—36] would occupy I was unable to see either the platforms of the scales or the chutes beneath the hopper. I could see a very short distance on the track looking easterly. The weigher could not get that view without getting up and changing his position. Having gotten up and looking out through the south window, he could see a portion of the platform upon which the train rested at the time it would be weighed.

(The photograph heretofore marked Defendants'

(Testimony of Thomas H. Selvage.)

Exhibit "C" was here shown to the witness and the witness is asked whether after looking at this photograph he would now say that there would be any difficulty in seeing the whole of the southerly track to the south of the scale-house, the observer being stationed at the south window of the scale-house.) That would depend on whether there is anything in the way. However, if one stood close to the window he could see that portion of the track and the platform occupied by the train at the time the coal is weighed. If you stood up where the chairs were, where the weigher is situated, you could not see those objects. The dimensions of the scale-house are approximately 8 feet north and south and 7 feet east and west. The chair in which the weigher sits is quite a little distance from the south window. The scales are more to the north side than to the south side. Even a small man could reach the south window from the chair by one step. Having reached the window he could see a portion of the cars on the platform. I am not quite clear whether he would look right down on top of the ore train. I remember that my view at the time was interrupted, but not knowing that I was going to be a witness in this case I did not pay particular attention to the nature of the interruption. Whether the weigher could see underneath the hopper would depend very much on the distance of the hopper from the scale-house. I could not see under the hopper when I was there and, of course, I could not see through the hopper. I do not believe [91—37] the weigher could see the chute under the

(Testimony of Thomas H. Selvage.)

hopper if the hopper were 100 feet from the scale-house. The weigher would be about on the same level with the chute, and, in order to see the coal emerging from the chute into the train, I think he would have to lie down flat on the platform. That is the only way that I know of that he could observe the loading operation.

I never was on the bunkers before the visits that have been referred to by me in my testimony here. I wish to add what I omitted to state before, that Mr. Roche and Mr. Sullivan were with me on the occasion of my last visit. That was the third visit.

When I went down to the bunkers, Mr. Mayer asked me what I wanted there. I told him that I was an assistant United States Attorney and that Mr. Tidwell was a customs officer and that we were going to take photographs of the top of the bunkers. He told me we could not do it. I told him I was there for that purpose, that I was going to do it, and I did do it. He asked me to wait until Mr. Mills came and I told him I would not wait for anybody. I had never met Mr. Mayer before. I just simply told him who I was. I knew there were third rails on that platform. It was the second visit that he spoke to me. I never had any difficulty in getting access there at all.

Redirect Examination by Mr. ROCHE.

Mr. Mayer did not state that the reason why he objected to Mr. Tidwell and myself going onto the bunkers was because there was a third rail there. I saw no United States Inspectors or Customs Officials

(Testimony of Thomas H. Selvage.)

upon the bunkers nor anyone except myself, Mr. Tidwell and the rest of my party. [92—38]

Recross-examination by Mr. DUNNE.

I paid special attention to the temporary planking on that visit when we took the photographs. I observed especially where the planking was bestowed and where it was not. I wanted to see whether or not there was planking enough to cover the open spaces and while I did not count the planks or anything of that kind, I simply looked at them and saw there were not enough planks there to cover the open spaces. I did not give this matter of the temporary planking the same special attention on the occasion when I went down there and found a ship discharging. When Mr. Mayer interrupted me on the occasion of my visit to the bunkers he said I would have to get permission from Mr. Mills. Mr. Mills was the superintendent.

[**Testimony of C. C. Dickson, for the Government.**]

C. C. DICKSON, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in San Francisco since 1906, and am and have been since 1910 in the employ of the Pacific Mail Steamship Company as clerk in the office of the Vice-president, Mr. R. P. Schwerin. Mr. Schwerin is also the General Manager of the Pacific Mail Steamship Company. I have been more or less familiar with the various employees of the Pacific Mail Steamship Company and know some of

(Testimony of C. C. Dickson.)

their names. I am now and since my employment with said company have been familiar with the various steamships or steamboats owned and controlled by the company and plying between San Francisco and foreign ports. (Admitted by the defendants that the Pacific Mail [93—39] Steamship Company owned the steamship "Manchuria.") The "Manchuria" plies between San Francisco and Hongkong-Victoria. The same is true of the steamship "China" which plies between San Francisco and Hongkong-Victoria. The steamship "Siberia" and "Corea" are similarly owned by the Pacific Mail Steamship Company and ply between the same aforementioned ports. The vessels named have been plying between said ports during the entire time of my employment with the Pacific Mail Steamship Company. The Steamship "Persia" is operated by the Pacific Mail Steamship Company under agency arrangements, and, during substantially the entire time of such operation has plied between San Francisco and Hongkong-Victoria. The Steamship "Mongolia" is operated by the aforesaid company between the same ports. So, also, the Steamship "Nile" under an agency agreement. The Steamship "Pennsylvania" is operated by the Pacific Mail Steamship Company between San Francisco and Balboa Canal Zone. That is also true of the Steamships "San Juan," "Aztec," "San Jose," "City of Sidney," "Newport," and "Peru." The vessels aforementioned have plied between San Francisco and the other named ports continuously during the years of

(Testimony of C. C. Dickson.)

my employment with the Pacific Mail Steamship Company, with the qualifications already testified to by me. I do not know whether or not we have an employee by the name of Captain Anderson. We do not have an employee by the name of Hoxhurst or Haxhurst. We did have a steamship named "Asia" but she was lost in 1910. I have no present knowledge as to the names of our employees upon that steamer. I do not recall whether J. W. Hoxhurst was an engineer or an official upon that boat. We have not, so far as I know, an employee by the name of P. H. McCarthy or [94-40] P. McCarthy. I am familiar with the names of our employees. We have not, to my knowledge, a Captain Wilson in our employ. In a general way, I have an acquaintance with the names of the employees of the Pacific Mail Steamship Company from 1906 to 1910. I am not in all instances in a position to say whether the parties heretofore mentioned were or were not employees of the Pacific Mail Steamship Company between 1906 and 1910. I have not sufficient information on the subject to answer. I do not know who was the chief weigher of the company. I do not know a man named W. S. Park. We do have an employee named Park, but I do not know his initials. I do not know in what capacity he is employed but he works at the dock. I do not know whether he is chief weigher. The name of the Marine Superintendent is William Chisholm, and he has held that office since I came into the employ of the company as above stated. I cannot say definitely whether he was prior thereto

(Testimony of C. C. Dickson.)

one of the chief engineers. I do not know whether a man named Allen was ever a chief engineer on the Steamship "China." I should say that no one in the employ of the Pacific Mail Steamship Company could tell you the names of all of the employees. Doubtless there is some official more familiar with their names than I am. I don't know whether the Assistant Treasurer would know or not. The name of the Assistant Treasurer is W. B. Wallock, and he held that office when I entered the service of the company—for how long before that I cannot say. (Admitted by counsel for the defendants that the Pacific Mail Steamship Company is a corporation organized and existing and doing business under and by virtue of the laws of the State of New York, and that it has been such corporation ever since January 1, 1904, and on that date). [95—41]

[**Testimony of David C. Norcross, for the Government.]**

DAVID C. NORCROSS, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I have resided in San Francisco about 18 years and have been Secretary of the Western Fuel Company since the first meeting of the board of directors after the incorporation of the company, at which meeting I was elected to said office. The Western Fuel Company at that time had its office at 318 California Street, now at 430 California Street. The former office was occupied until the conflagration in San Francisco, and the latter office has been used

(Testimony of David C. Norcross.)

since August 1907. I have been more or less familiar with the Folsom Street dock or bunkers since 1906. The Western Fuel Company first took possession of said dock and bunkers in July, 1904. Since I became Secretary the company has been in possession of the following docks in San Francisco: Mission Street dock, Howard Street Dock No. 2, Folsom Street dock, and for a portion of the time of the Vallejo Street dock. The company first used Mission Street Dock Number 2 in the receiving and discharging of coal, going into possession of said dock on January 1, 1903. The company continued to use that dock until some time in 1910 or 1911 when it was taken down. There were bunkers there. The company occupied the south side of the wharf as well as the bunkers. The next wharf or dock on which the company undertook to do business was Folsom Street. I am not quite certain when we first went into possession of the Howard Street dock, but think it was in 1904, or a little before. There were bunkers already located on that wharf. And after the Western Fuel Company rented the wharf from the State Board of [96—42] Harbor Commissioners it rented and used the bunkers. I think, though I am not certain, that we first went into possession of the Vallejo Street wharf some time in 1911.

The business of the Western Fuel Company consists, among other things, in importing, buying and selling coal, including the importation of coal from foreign countries. The company owns coal mines at Nanaimo, to which it acquired title, I think, at the

(Testimony of David C. Norcross.)

time of its incorporation. Those are the only mines owned by the company in a foreign country. The business of the company, among other things, has been to mine coal at Nanaimo and to import it to the United States via port San Francisco, but we did not import coal into other places—we have sold it at the mine for shipment to such other places. All of the coal that was mined at Nanaimo and brought into the United States at ports other than San Francisco was sold at the mine or on the boat, with the exception of some cases where we sold the coal to deliver, San Diego being an instance of that, and that was regular annual business. I would say roughly that 60 or 65 per cent of the foreign coal imported by us into San Francisco is discharged at the Folsom Street dock or bunkers. The remaining portion of such foreign coal is discharged at Oakland, at Mission Street wharf and at Vallejo Street. Not very much coal has been discharged at Vallejo or Mission Street, however, most of the coal not discharged at Folsom Street being discharged in Oakland. We gave up the Mission Street wharf about two years ago when the bunkers were dismantled. As far as the Vallejo Street wharf is concerned we are still operating it, but I cannot say whether it is used almost exclusively for local coal or not.

The directors of the Western Fuel Company at the time when I was elected secretary and from the date of the incorporation [97—43] were John L. Howard, James B. Smith, Joseph L. Schmitt, J. C. Wilson and Sidney V. Smith. The official designa-

(Testimony of David C. Norcross.)

tion of the defendant John L. Howard was President, of the defendant James B. Smith, Vice-president, of the defendant Joseph L. Schmitt, Director (and he was not Treasurer), of Sidney V. Smith, Director, and of J. C. Wilson, Director. They had no treasurer at that time. The First National Bank was custodian of the funds. I was Secretary.

I have twice visited the company's mines at Nanaimo—first in February or March, 1904, when I remained about a week and visited various parts of the mine, though I did not inspect or go over the entire system because I was more interested in the office than anything else, and just looked casually at the rest of the concern. I examined the books and paid some attention to the properties generally. I paid no particular attention to the weighing and shipping of coal more than to see it coming up out of the mine, passing over the screens, and being loaded into the cars and weighed on the track scales. Most of the coal imported into San Francisco from Nanaimo is clean house coal. The dock is not over a quarter of a mile away from the place where the coal is weighed.

There is a set of bunkers on the dock. The coal having been taken from the mine is placed in cars which are propelled along a railroad track to a scale-house; thence from the scale-house over the line of railway to the coal-bunkers on the dock; thence from the bunkers to the ship or collier about to be laden. Whether or not the tare weight was marked on the side of the cars I do not know. They could not very well get the net weight without weighing the coal.

(Testimony of David C. Norcross.)

While I was at the mine I saw the coal pass onto the scales. I never was inside of the scale-house, however. I did not look to see whether anybody was at the scales inside the scale-house when the coal was run on the scales. I presume there might have been someone in there; they would not be passing cars over. The cars [98—44] were very small, having a capacity of 5 or 6 tons. I could not say whether they weighed the cars one at a time or more than one at a time—I saw the operations merely incidentally as I was passing by. I saw that is what was going on down there, they were evidently weighing cars. On the occasion of my first visit there was no ship at the dock and, therefore, I could not say whether in each instance the coal was first discharged into bunkers and from there into the ship, or whether the coal was sometimes discharged directly from the cars to the ship. When I was there the cars were dumped into the bunkers. I do not know whether the bunkers were pocketed.

I next visited Nanaimo in 1911. I was there two days loafing most of the time. It was simply a visit and not a business trip. I do not remember looking at the scale-house, and I did not see them weighing coal as I was passing by. I do not recall observing the operations as the coal was brought from the mine to the scales and thence to the bunkers. We had some larger cars at this time than those which were there before. I think the capacity of these cars would be about 15 tons. I don't know whether the tare weight was printed on the side of the car. That

(Testimony of David C. Norcross.)

is the last time that I visited the mine. I did not examine the time books relating to the weights kept of coal and I have never seen those books. Thomas Russell was then in charge of the mine. The resident agent now is Thomas R. Stockett. I think he has been there since 1904. I am not sure. Thomas Russell immediately preceded him. Russell was superintendent of the mine. Mr. Stockett is manager. He receives his salary from the Western Fuel Company. He is also known as the resident agent and has been during the years to which I have referred. Whether a document was ever executed in pursuance of a resolution of the board of directors relating to Mr. Stockett and sent to him [99—45] or to the American Consular Agent at Nanaimo, I do not know but I will look among our records to see if there is such a document. (Admitted by the defendants that said Stockett has been the duly appointed resident agent for the Western Fuel Company at Nanaimo and that, subject to correction, he has held that office from 1904 to date. Admitted also, subject to correction, that his predecessor was Thomas Russell.)

There were bunkers on the Folsom Street dock in San Francisco when we went into possession in July, 1904, and these bunkers had been occupied by the corporation that preceded the Western Fuel Company on that wharf. I do not think I have been on the superstructure of the Folsom Street dock more than three or four times during all the period that I have been Secretary of the Western Fuel Company. On those occasions I just casually looked over the

(Testimony of David C. Norcross.)

superstructure. I know where the offshore and in-shore bunkers are situated and that the offshore bunker is toward the easterly end of the dock.

I have had custody of the books of the Western Fuel Company from the time of my appointment as secretary to the present date, and have supervision over the same. I am more or less familiar with the books, records and documents kept by the company. I have heard that the compartments of the offshore bunker are numbered but I do not know that to be a fact and I have never seen it set down in any of the records of the company. No records that I have refer to the pockets by number. I do not know anything about the character of the partitions existing between the pockets, or about their relative height. I have never paid any attention to that matter. I do not know where the balance sheet for the month of April, 1906, for which you have heretofore asked me, is. I thought it was among the papers that were brought up here. [100—46]

John L. Howard is and has been since the incorporation of the Western Fuel Company the president of said company. I am not related to him.

James B. Smith is vice-president and is a very active vice-president. He is the manager of the business in California, has full charge of the bunkers, the employees here and the selling of the coal here. He has complete charge of the entire business here and the employment and discharge of the help. He has charge, of course, of the receipt of the coal at this port. He has foremen and superintendents

(Testimony of David C. Norcross.)

under him to attend to the details. He spends practically all of his time during working hours attending to the business of the Western Fuel Company. I believe that he visits the various properties of the company in San Francisco as the exigencies of the case require. I have not actually seen him upon the properties since 1907. He examines some of the records in the office of the company. I know he sees the monthly sheet and the reports and bills, but I could not say how frequently. When I say "monthly sheets," I am not referring to the sheets showing the receipt and sale of coal. I am referring to the balance sheet and the earning sheet. I mean reports that are submitted each month or about every month at the meetings of the board of directors. Mr. Smith by examination of the records of the company keeps himself in touch with the doings of the company.

President Howard's principal duties are in connection with the mines in the north which he visits two or three times a year, remaining from one to three weeks at a time. When not at the mine he is located in the office of the Western Fuel Company. He has very little to do with the company outside of his connection with the mines from which he gets reports—he receives letters from and writes letters to the mine. When down here he attends more to outside interests than he does to the Western Fuel Company. He presides at the meetings of the board of directors, of which he is president. The defendant Howard, familiarized himself from time to time with the monthly and annual statements. I have seen him examine,

(Testimony of David C. Norcross.)

among other things, the monthly statements to which I referred a few moments ago, containing a general summary of the monthly business of the corporation.

The sheet which is now shown me entitled: "Western Fuel Company, summary of receipts, sales and profits, San Francisco Depot, coal account, dated April 30, 1906," is not one of the sheets which the president of the company examines. The sheets which he does examine are the general balance sheet and earning and expense statements. These reports were kept by the bookkeeper and myself [101—47] and prepared by the former whose name is Martin.

[**Testimony of Hugh Edwards, for the Government.**]

HUGH EDWARDS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am now and have been for 6 years a United States Customs Inspector at Seattle. I visited the mines at Nanaimo in September, 1907, in my official capacity. I was there a little over two days engaged in weighing coal at the scale-house from 7 o'clock in the morning, and all the time that I stayed there both day and night for two days and a night that I was there. I had no time to visit the mine itself. Coal was brought to the scale-house on small cars of 5 or 6 tons capacity. The bunkers were nearly half a mile from the scale-house and are right on the dock. The coal goes from the scale-house to the bunkers on cars. When I got there there was a boat or barge being loaded with coal. I went down to the dock to get my meals on the steamer. The coal that I was weighing

(Testimony of Hugh Edwards.)

was discharged directly into the ship. The tare weights were marked on the cars. The weigher informed me that those tares were taken every so often on all the cars. The cars were weighed separately and not by trains. As the trains came down the first car was weighed and the train was pulled forward sufficiently to weigh the next car and so on to the end of the train. The net weight of the coal was taken by taking the tare weight marked on the car and subtracting that from the gross weight of the car. Record was kept of the weight of each carload of coal by the weigher who had a tally sheet. I do not think that the weights were being taken on what is known as a rising-beam. The weights were taken as accurately as they could be obtained, not down to the pound, however, but by 5's and 10's as coal is usually weighed. When you weigh by 5's and 10's the weights usually average themselves and even up. No advantage was given to either party in using these weights. Answering the question as to what I mean by weighing by 5's and 10's, I would say that "as near as I can [102—48] remember the scales are only marked on the 5 lbs., you know, on the 5 lb. beam. They did not weigh it as other scales do by lbs. and ounces, but it is just weighed by 5's, you know; but I am not positive of that."

(The prosecution here produces what purports to be a chart of Nanaimo. Counsel for defendants agree that it may be used for showing in a general way the general location of scale-house and tracks, on the understanding, however, that they do not stipu-

(Testimony of Hugh Edwards.)

late as to the correctness of the tracks, or any of the dock-houses and that they are not foreclosed with reference to any object appearing on the chart which they may hereafter desire to dispute.) The chart shows the harbor as it looked when I was at Nanaimo. The tracks from the shaft of the mine to the scale-house ran right by the shore line and on leaving the scale-house ran down the shore line to the bunker. In other words, the tracks from the mine to the bunkers would pass the scales. A track scale was used and the track thereof connected with the general track last above described. (The chart above referred to was here introduced in evidence as United States Exhibit Number 21 to illustrate the position of the tracks in a general way and the location of the harbor.) The object designated "loading wharf" in this chart is the wharf upon which the bunkers are located. I do not think that any carload of coal passed over the scales, while I was in the scale-house, that was not weighed. I think the coal at the dock was discharged directly into the ship from the cars. I think the bunkers on the dock were divided into compartments. The only records of the weights of the coal that I know about which were kept by the Western Fuel Company were those taken by the [103—49] company weigher on tally sheets. I also kept weights myself and kept them accurately and truly, and they agreed with the weights kept by the company's weigher because we were taking the weights together at the scales. The coal which was loaded in the two boats that I saw there was destined

(Testimony of Hugh Edwards.)

for various Alaska ports. The boat was the Steamship "Seward." She cleared in Seattle. I was weighing coal at Nanaimo into this ship 39 hours consecutively, stopping only for lunch. I acted as weigher for all coal that was laden upon that steamer. I think the steamer came back to Seattle and duty was paid on the coal in Seattle. I think the object in sending an inspector from Seattle to Nanaimo was so that this coal might be cleared in Seattle so that it might enter the Alaska ports without the supervision of the customs officers because the coal goes to ports that have no weighing facilities. With this particular cargo, however, I am not positive. (The testimony included in the last statement was admitted over the objection of the defendants, to which exception was duly taken.) The reason I am not positive respecting this particular cargo is that after we got through at Nanaimo, the vessel went to Bellingham and I came back from Bellingham to Seattle. Bellingham is in the same district with Seattle. I do not know of my own knowledge whether the duties paid by the United States Government upon that coal were paid at either Bellingham or Seattle, and I do not even know whether the duties were paid in the district of Puget Sound. I cannot say for certain whether the duties were paid upon that particular cargo of coal. The vessel that I have been referring to arrived at Bellingham on September 19, 1907. The coal was not reweighed at Bellingham. It was not taken out of the boat and weighed at Seattle to my knowledge. I did [104—50] not see the

(Testimony of Hugh Edwards.)

ship's manifest before she left the Port Nanaimo or the invoice, if there was such.

I have never visited the Ladysmith mine, and the occasion to which I referred was the last and only occasion upon which I visited Nanaimo.

Cross-examination by Mr. McCUTCHEON.

I do not know whether or not there is more than one mine at Nanaimo belonging to the Western Fuel Company. I do not know from what mine this coal I weighed up there came from. The Western Fuel Company weigher and I weighed together, I handled the beam part of the time and he handled the beam the other part of the time and we took the same weights and they necessarily agreed. I was sent to Nanaimo to weigh coal by the Chief Inspector of the port at Seattle. It was either because there was no government weigher at the Alaska ports or that there were no weighing facilities at the different ports that I was sent there.

[**Testimony of Guy M. Watkins, for the Government.**]

GUY M. WATKINS, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in Portland, Oregon, 9 years, and am and have been for 23 years last past Special Inspector of Customs there. I visited the Western Fuel Company's mine at Nanaimo once,—that was in the spring of 1911. I stayed there a portion of the day. The mines were at that time closed down.

(Testimony of Guy M. Watkins.)

There was a strike on. I did not see the records of the company so as to find out what their system of weighing, etc., was. The [105—51] scale-house is in the neighborhood of half a mile from the bunkers. The track from the mine to the bunkers passes over the scales. I believe there are two sets of such tracks, one of which passes over the scales and is then connected by a switch with the other beyond the scales and toward the bunkers. The day after I was at Nanaimo I visited the Ladysmith mine and was there a part of a day. I went into the scale-house at the Ladysmith mine. About two train loads passed over the scales and were weighed, and then I followed them down to see that they were dumped into a vessel. There are bunkers about a quarter of a mile from the scales. The bunkers were right in the harbor, and the boats ran right alongside them and the coal was dumped from the car down a chute into the vessel direct. The cars from the mines passed over the scales, and I think there was another track leading back to the mines. The track which lead from the mine to the bunkers passed over the scales. Two train loads passed over the scales and both were weighed while I was there.

Cross-examination by Mr. McCUTCHEN.

To the best of my recollection the switches at Nanaimo were beyond the scale-house. I was at Nanaimo a good portion of the day and my recollection about the situation is not hazy. I would be surprised to hear that the switches were to the mine side of the scale-house because my impression, though it was

(Testimony of Guy M. Watkins.)

only an impression, is otherwise. I saw no coal weighed there, the mines being closed down.

[**Testimony of F. B. Winebrenner, for the Government.]**

F. B. WINEBRENNER, a witness called for the United States, and sworn, testified as follows:

[106—52]

Direct Examination by Mr. ROCHE.

I live and have lived in Seattle for something over ten years, and have been acting in the capacity of weigher and gauger in the Government service for about five years though my official appointment has been within the past year. I visited the mines of the Western Fuel Company in Nanaimo on March 29, 1909, remaining there four days. I was engaged in weighing coal which was to be taken to Seattle and discharged there. I went to Nanaimo to inform myself as to the method of handling the coal there. I went up to the mines themselves during off hours and walked around. I also visited the bunkers on the docks. The scale-house is somewhere in the neighborhood of half a mile from the bunkers. There was only one scales at the scale-house—it was a track scale. My recollection is that only one track passed over the scales, and that that was the track which came from the mine to the bunker. All the coal that went from the mines to the bunkers went over the scales. I think my hours of service were from 7 o'clock in the morning until 12 at noon, and from 1 o'clock until 5. The company's weigher worked with me. We took weights together. The cars were

(Testimony of F. B. Winebrenner.)

wooden cars on iron tracks and had a capacity of about 4 1/2 tons of coal. The cars were weighed one at a time. The tare weight was marked on the cars. The coal having been weighed was taken directly aboard the vessel. I observed at the bunkers that the coal was discharged into a chute and put immediately aboard the vessel. The bunkers were partitioned off, but I don't recollect whether they were numbered. I could discover only one scale-house connected with the Nanaimo mine and I was located in that scale-house during the four days [107—53] I was there. I assisted in weighing all the coal that went into that vessel. The name of the vessel we were loading was the "Hayden-Brown." She subsequently went to Seattle. I went by rail to Victoria and thence by boat to Seattle. I did not see the bill of lading before we left Nanaimo, nor the invoice until I got into Seattle. The invoice and the weights that I secured were practically the same. I was never at Ladysmith.

Cross-examination by Mr. McCUTCHEON.

I visited only one mine at Nanaimo. I do not know whether the Western Fuel Company had more than one mine there or not. I do not know whether or not all of the coal mined by the Western Fuel Company at Nanaimo passed over the scales to which I have referred. The coal that was loaded while I was there did not go through the bunkers, but was laden directly on the ship from the cars. I do not know whether all of the coal that was mined by the Western Fuel Company at Nanaimo and which was

(Testimony of F. B. Winebrenner.)

loaded on vessels at Nanaimo passed over the scales to which I have referred, though all of the coal that went to the bunkers in my presence there went over the scales. Whether or not the Western Fuel Company was operating mines other than the mine I visited I do not know. There were bunkers alongside the tracks and near the dock. I saw some other bunkers over to the left—a distance of probably 100 yards. There was a track connected with these last-named bunkers. That track at the other end reached to the same point as the first track that I have discussed and the second track also passed over the scales. I saw no other bunkers in that locality, though I was there four days. When I say I walked to the mine, I mean that I went to the shaft from which the particular [108—54] coal that I was weighing came. I visited no other mine. I saw no other bunker or bunkers of any description other than those I have discussed. I did not look for others.

Redirect Examination by Mr. ROCHE.

I was sent by my superior officer to Nanaimo for the express purpose of ascertaining the method of weighing coal there.

Recross-examination by Mr. McCUTCHEON.

I was sent to Nanaimo to ascertain the method of weighing only that coal which is shipped to the city of Seattle. There may have been other mines in operation at Nanaimo than the one which I saw.

(Testimony of F. B. Winebrenner.)

Further Redirect Examination by Mr. ROCHE.

The coal which was being weighed at Nanaimo when I was there was bulk or lump coal. We called it simply "Nanaimo coal."

[**Testimony of D. C. Norcross, for the Government
(Recalled)].**

D. C. NORCROSS, on the resumption of his direct examination by Mr. Roche, testified as follows:

I have not as yet been able to find the coal statement for April, 1906.

On December 31, 1912, the Western Fuel Company had five barges: The "Comanche," "Nanaimo," "Ruth," "Theobald," and "Ludlow." I am not sufficiently familiar with those barges to attempt to describe them. We also owned the "Melrose"—that makes the sixth barge, and for that matter I ought also to add the "Wellington." We had the "Comanche" in 1903 and the "Ruth" in 1905. In addition to the seven barges which I have named the Western Fuel Company once had the "Corsair," and there [109—55] may have been another one which was worn out and dismantled. It was several years ago when the two last-mentioned barges went out of service. The Western Fuel Co. never owned, controlled, or operated any barges other than those already named.

The defendant, Joseph L. Schmitt, has been director and treasurer of the Western Fuel Company since 1906. Prior to that time there was no treasurer and the funds were deposited in the First National Bank.

(Testimony of D. C. Norcross.)

Defendant Robert Bruce is now director of the company. He occupies no other office. He has been a director, I believe, since 1905, but not continuously. He took the place on the board of directors of J. C. Wilson. (Here admitted by defendants that Robert Bruce became a director March 23, 1905, and that he remained such until April 29, 1909, and that he again became a director April 6, 1911, and ever since has been and still is a director.) He held no position except that of director except that he was a member of the executive committee appointed by the board of directors, which committee, so far as I know, met some half dozen times. Sidney V. Smith never held any position except that of director, except that at the first meeting at the time of the incorporation he acted as secretary.

The defendant F. C. Mills is superintendent of the docks. His superintendency includes all of the docks of the Western Fuel Company in San Francisco and dates from the incorporation of the company. Mr. Mills has also had the supervision of the barges and the crews upon the barges and of the employees on the docks.

Defendant, E. H. Mayer, is the check clerk and weigher on the bunkers, mostly on the Folsom Street bunkers. He has been in the employ of the company since the first of January, 1904, and during all of the intervening time has been employed in the capacity mentioned. His immediate superior is Mr. Mills. The defendant Edward J. Smith is a checker or tally clerk and has been such for the last two or

(Testimony of D. C. Norcross.)

three years. He was not employed by the Western Fuel Company prior to that time. He performs his services upon whatever docks or barges they [110 —56] may be required. He was never employed on the bunkers so far as I know, as I understand it, his services are usually rendered on barges loading coal into vessels that are supplied with fuel by the Western Fuel Co. The officer in charge of each barge is the foreman. I do not know the names of any of the barge foreman of date December 31, 1912. I never come in contact with them. The greater part of coal imported into San Francisco from Nanaimo is lump coal, though there is some steam coal. Lump coal is coal that has already passed over the screen. This lump coal is called Nanaimo or Wellington coal. The steam coal is designated Wellington steam coal or steam coal alone. We used to discharge a great deal of the Wellington lump coal at the Mission Street bunkers as well as at Folsom Street until the Mission Street bunkers were taken down in 1908 or 1909. I don't remember myself ever going upon the Mission Street bunkers, and I do not recall anything about the location of the scale-house upon said bunkers. There is a pretty steep stairway up to the bunkers on Folsom Street on the west side of said bunkers; it is pretty steep. It ascends to a door which I think is kept locked. I believe there is a sign of "No Admittance" on the lower works. Whether there is any other means of access to the bunkers than the stairway which I have mentioned I do not know. The general public is not admitted

(Testimony of D. C. Norcross.)

to the bunkers. The Folsom Street yard is just across the Embarcadero and is connected with the bunkers by a tramway. It is a good sized yard. We have another yard on Beale Street, but I do not know whether we are using it or not. The coal is brought there by teams. The greater portion of our foreign coal is now and has been for years discharged at the Folsom Street bunkers. The Western Fuel Company also operates in Oakland. It rents bunkers there which are known as the Howard Bunkers. All foreign coal imported by the Western Fuel Company and discharged at Oakland is discharged at the Howard Bunkers. Our office in Oakland is at First and Market Streets. There are records kept of the coal received and coal sold both at San Francisco and Oakland. These records were compiled from month to month and are kept in the San Francisco office of the Western Fuel Co. The coal imported [111—57] into California via Port San Diego was recorded in San Francisco and practically charged against the San Francisco office.

The kinds of coal imported during these years by the Western Fuel Company were Australian, Japanese, British Columbia, Comax and Wellington. The Wellington coal was imported exclusively from Nanaimo and Ladysmith. Up to 1907 most of the Wellington coal came from Nanaimo; all of the New Wellington coal came from Nanaimo. The Comax coal came from Comax, British Columbia. We import but very little Japanese coal. From Australia we imported Richmond and Aberdeen coal

(Testimony of D. C. Norcross.)

but called it all generally Australian coal. The proportion of coal imported from Australia as compared with British Columbia was small. I should say that in 1912 75% of the coal imported was Australian. That was on account of the strike at the Nanaimo Mine. In the year 1911 I should say 40% of the coal imported was Australian.

BE IT REMEMBERED that thereupon the following proceedings occurred and that the following testimony was given:

“Q. Are there daily records kept by the Western Fuel Company showing receipts of coal from all sources? A. Yes.

Q. Including foreign coal imported? A. Yes.

Q. And are there also daily records kept by the Western Fuel Company of sales or distribution of coal? A. Yes.

Q. And it is also true that at the end of each month from those daily records are compiled statements showing the total amount of coal received and the total amount of coal sold by the Western Fuel Company, for each calendar month? A. Yes.

Q. By whom are the monthly reports compiled?

A. By Mr. Martin, the bookkeeper.

Q. And checked over by anyone?

A. Yes, by two or three; he makes the final summaries. [112—58]

Q. That is, they are checked by two or three, but Mr. Martin makes the final summaries; is that correct? A. Yes.

Q. And the Western Fuel Company from time to

(Testimony of D. C. Norcross.)

time has acted, has it not, upon the monthly statements?

Mr. McCUTCHEON.—I object to that, if the Court please, as calling for the conclusion of the witness.

Mr. ROCHE.—Very well; I will withdraw the question.

Q. It is also a fact, is it not, Mr. Norcross, that separate monthly summaries, so far as tonnage was concerned, were kept for the San Francisco and the Oakland depots?

A. The bookkeeper made those and kept them, yes.

Q. And they were kept separately? A. Yes.

Q. In other words, there was a separate statement made out for the San Francisco office and another separate statement for the Oakland office?

A. That is correct.

Q. I direct your attention to a paper entitled "Western Fuel Co. Coal received at San Francisco Depot, April 30, 1906, coal account," and ask you if that is the monthly statement for the month of April, 1906.

A. That is the detail of coal received, yes.

Q. Does that statement show the quantity of coal on hand in the Western Fuel Company, on the 1st of April, 1906? A. No, it does not.

Q. Does it, so far as the San Francisco depot is concerned? A. No, sir, it is not supposed to.

Q. You say it is not supposed to? A. No.

Q. Now, I call your attention to another report or statement entitled, "Western Fuel Co., coal received at Oakland Depot, April 30, 1906, coal ac-

(Testimony of D. C. Norcross.)

count," and ask you if that is the monthly statement for the month of April, showing coal received at the [113—59] Oakland Depot? A. That is correct.

Q. Before offering those documents in evidence I want to call your attention to another statement dated April 1st, 1906, entitled "Western Fuel Co., summary of receipts, sales and profits, Oakland Depot, Coal Account," and I ask you to look at that and state whether that statement shows the quantity of coal on hand at the Oakland Depot on the 1st of April, 1906? A. Yes, it does.

Q. It does not show the totals, does it?

A. Certainly it does.

Q. It shows the totals of all coals, but I mean that the domestic coal is not separate from the foreign coal.

A. Yes, it is; the detail of each kind of coal constituting the stock on the first day of April.

Q. You don't understand me, Mr. Norcross, I say you have not a total of all the foreign coal on hand; in other words, these figures have to be added up?

A. I don't know what you mean by that. They are added up at the bottom. That is the total of all the coal on hand on April 1st, 1906.

Q. And this statement showing total amount of coal on hand on April 1, 1906, includes the domestic coal, does it? A. Yes.

Q. That is what I am trying to get at, the total of foreign coal is not separate from the total of domestic coal on hand? A. No, it is not.

Q. This statement was compiled by whom, and

(Testimony of D. C. Norcross.)

from what source?

A. Compiled by the bookkeeper from his regular daily [114—60] records, purchases and sales.

Q. And was checked up? A. Certainly.

Q. Does this statement show in tons the amount of coal received during that month at this depot?

A. Yes, the totals of each kind.

Q. And the total balance on hand? A. Yes.

Mr. ROCHE.—We offer these documents in evidence, may it please the Court.

Mr. McCUTCHEN.—Mr. Roche, do you claim that these documents were seen by these defendants?

Mr. ROCHE.—By what defendants?

Mr. McCUTCHEN.—By any of the defendants.

Mr. ROCHE.—I don't know whether they were seen or not. We are offering them for the purpose of showing the quantity of coal on hand on the 1st day of April, 1906; and we intend to follow this up by showing from the records of the Western Fuel Company the amount of coal received between that date and the 31st of December, 1912.

Mr. McCUTCHEN.—Unless counsel says, if your Honor please, that he proposes to show that these papers were seen by these defendants, we object to the offer.

Mr. ROCHE.—Of course counsel understands this, may it please the Court—what is the ground of your objection, Mr. McCutchen?

Mr. McCUTCHEN.—That the defendants are not bound by these papers unless they saw them. You say you do not propose to show that the defendants

(Testimony of D. C. Norcross.)

ever saw them. Unless you do they are certainly not admissible against the defendants.

Mr. ROCHE.—This is the situation, if your Honor please: It is necessary for the Government in this case to [115—61] show, among other things, first the quantity of coal the Western Fuel Company had on hand on a given date; the quantity of coal received by the Western Fuel Company from that date to another given date, which we will arbitrarily fix at this time as the 31st of December, 1912; and likewise to show the quantity of coal sold between those two dates, and the quantity of coal on that date, for the purpose of establishing the excess of coal over the importations; in other words, that the Western Fuel Company did sell during that period of time a number of tons of coal above and beyond the tonnage of coal received by it. Now, of course, it is true, may it please the Court, that a record which is not brought to the attention of one of the defendants is not ordinarily admissible in evidence, but that of itself does not prevent us establishing by testimony which is admissible and which is in fact practically the only testimony available, by the records of the company the quantity of coal which was in the possession of the company, the quantity of coal which was subsequently received by the company, and likewise the quantity of coal which was disposed of by the company during that same period of time.

Mr. McCUTCHEN.—We don't put our objection upon that ground, but we do object that these documents are not admissible against these defendants,

(Testimony of D. C. Norcross.)

if the defendants have never seen them.

Mr. ROCHE.—Then, as long as counsel does not object upon the ground that the evidence is not the best evidence, and that these entries are not original entries, may it please the court, it occurs to us that the objection must be overruled because they are being offered at this time for the purpose of establishing what appears to exist upon their face. [116—62]

The COURT.—The objection is overruled.

Mr. McCUTCHEON.—We note an exception.

Mr. ROCHE.—I just want to read into the record a part of this, and the balance can be considered as read. Is that satisfactory?

Mr. McCUTCHEON.—Yes.

Mr. ROCHE.—“Coal on hand, April 30, 1906, Duns.” I suppose that means Dunsmuir Wellington. Will you read this, Mr. Norcross, I don’t know exactly how that is divided.

A. “Dunsmuir Wellington, 5615 tons, 2168 lbs.; New Wellington, 64 tons, 1536 lbs.; New Wellington screenings and slack, 4212 tons, 1473 lbs.; Australian, 1099 tons, 73 lbs.; Cannel, 26 tons, 1160 lbs.; Cannel screenings, 40 tons; Welsh Anthracite Screenings, 1451 tons, 350 lbs.”

Q. That is all of the foreign coal; can you add those figures up?

A. Total 12,510 tons and 40 lbs.; that addition, Mr. Roche, is subject to correction, of course, if I have made any mistakes.

(Testimony of D. C. Norcross.)

(The document was here marked "U. S. Exhibit No. 22.")

Q. Now, I direct your attention to another sheet, similar in kind, only relating to the San Francisco Depot, entitled "Western Fuel Co. Summary of Receipts, Sales, and Profits, San Francisco Depot, Coal Account," and ask you whether that sheet indicates, among other things, the amount of coal on hand in the San Francisco Depot belonging to the Western Fuel Company on the 1st day of April, 1906? A. That is correct.

Q. And this was compiled, as already indicated by you and in the same manner as the exhibit last offered in evidence was compiled; is that correct?

A. Yes. [117—63]

Mr. ROCHE.—We offer this document in evidence.

Mr. McCUTCHEN.—We make the same objection. I suppose that that objection can be considered as made to all these offers, and the objection overruled and an exception taken.

Mr. ROCHE.—Yes, we will stipulate that; that is, the objection proceeds on the same grounds already stated.

Mr. McCUTCHEN.—Yes. Is that satisfactory, your Honor?

The COURT.—Very well.

Mr. ROCHE.—The entire document may be considered as having been read. I just desire to direct the attention of the jury to the foreign coal on hand:

(Testimony of D. C. Norcross.)

“Dunsmuir Wellington, 3044 tons, 500 lbs;
New Wellington, 17125 tons, 1513 lbs;
Comax coal, 1191 tons, 1251 lbs;
Australian, 270 tons, 44 lbs;
Cannel, 128 tons, 1304 lbs.”

Q. Is there any other foreign coal on that?

A. No.

Q. Now, will you kindly add those figures up?

A. You made a mistake about this Dunsmuir Wellington, those figures mean that that was oversold.

Q. It is under the designation of “coal on hand”?

A. It is, but it is in red ink.

Q. You say that the Dunsmuir Wellington, 3044 tons, 500 lbs., ought not to be included as coal on hand?

A. It should be deducted; also the other red-ink figures. Is not Comax in red ink?

Q. What is your explanation of that?

A. That those coals on the stock records have been oversold that quantity. This one possibly has been undersold. You cannot separate them. [118—64]

Q. In other words, that 3044 tons and 500 lbs. had been sold more than the books showed were on hand?

A. They get confused, Dunsmuir and New Wellington and Comax.

Q. In reading the Oakland statement, did you eliminate from consideration the figures in red ink?

A. I don’t think there were any.

Q. Will you then read into the record the foreign coal on hand in the San Francisco Depot on the 1st of April, 1906, as indicated by that statement?

(Testimony of D. C. Norcross.)

Mr. ROCHE.—I might say to the Court that we do not desire to have the witness make any calculations excepting so far as the first month is concerned; in other words, we desire to get into the record the exact amount of coal on hand on that date for the purpose of comparing those figures with the sheet heretofore furnished to us by the witness and which apparently at this time is lost or temporarily misplaced.

A. Of the British Columbia coal there was on hand 12,889 tons, 2002 lbs. The Australian coal was apparently oversold 270 tons and 44 lbs. We had on hand of Cannel coal 128 tons, 1304 lbs.

Q. What is the total amount of foreign coal on hand in the San Francisco office at that time?

A. 12,748 tons, 1022 lbs.

Mr. ROCHE.—I might say, Mr. McCutchen, that that is within tons of the quantity of coal on hand indicated on the sheet which was indicated by the witness yesterday afternoon—which was referred to by him.

Mr. STANLEY MOORE.—That comes, Mr. Roche, within 8 tons of the number of tons on the sheet furnished by the witness [119—65] heretofore. Let me ask you, does that include the poundage?

Mr. ROCHE.—No, I don't think we figured on the lbs.

Mr. STANLEY MOORE.—Well, I think that if you did figure on the poundage that you would come even closer than the 8 tons.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—Q. Did you take into consideration the number of lbs. too in making this calculation?

A. Yes, it is supposed to be exact.

Q. Well, this approximation is subject to correction in any event.

Mr. STANLEY MOORE.—Well, it is substantially correct.

Mr. ROCHE.—Yes.

(The document was here marked "U. S. Exhibit No. 23.")

Q. Do these figures indicate all of the foreign coal on hand and in the possession of the Western Fuel Company, both in San Francisco and in Oakland, on the 1st day of April, 1906?

A. It indicates what our books called for on that date.

Q. What I am trying to get at is an explanation of these items contained in your books; is it not a fact that those two items are supposed to show all of the foreign coal on hand in San Francisco and in Oakland on the 1st of April, 1906? A. Yes.

Q. That is correct, is it? A. That is correct.

Q. And the Western Fuel Company, to your knowledge, had no other foreign coal on hand in the State of California? A. No.

Q. Because the San Diego Depot, if there was any coal on hand at that time, there, was taken into consideration in fixing up the figures, or compiling the figures for the San Francisco office? A. Yes.

Q. I direct your attention to a number of sheets and ask you to look at them for a moment and to

(Testimony of D. C. Norcross.)

state whether [120—66] those are the monthly sheets showing coal received by the Western Fuel Company in San Francisco and in the Oakland office for the months commencing with the month of May, 1906, and ending with the month of December, 1906?

A. Here is the month of April; this is coal received for the month of April.

Q. Well, this is an entirely different statement. I will have that put with the other statements.

A. Those are the statements of coal received.

Q. Now, I call your attention again to those two sheets which you handed me a moment ago, and I ask you whether these two sheets do not also show coal received during the month of April?

A. These are the totals. Those show the details—

Q. (Intg.) Mr. Norcross, you are mistaken about that, are you not? Those are not the two sheets you made the additions on?

A. No, those are the two sheets you have in your hand now for the month of April.

Q. That is what I am talking about, showing the coal received.

A. Yes, the detail of the coal received; they are the same as those.

Q. That is, they are the same as these other statements you have just handed me? A. Yes.

Q. They are not the same as the two statements you testified to a few moments ago which have been introduced as "U. S. Exhibits 22 and 23," are they?

A. They are not.

Q. Each of these statements indicating coal re-

(Testimony of D. C. Norcross.)

ceived at Oakland during a given month does show all of the coal received at the Oakland Depot for that given month? A. That is right. [121—67]

Q. Including all foreign coal? A. Yes.

Q. And each of these sheets purporting to show coal received at San Francisco for each particular calendar month does show all of the coal received by the Western Fuel Company in San Francisco?

A. Yes.

Q. So that both of these sheets together do show all of the coal received by the Western Fuel Company in the State of California for each given calendar month? A. Yes.

Q. That is correct, is it? A. Yes.

Q. And these sheets cover from April 1, 1906, to December 31, 1906? A. I did not look that over.

Q. Well, just look at them so that you can answer that question.

A. That is correct, April to December.

Q. Let me ask you one other question with reference to the imported coal so far as these weights are concerned; It is also true, is it not, Mr. Norcross, that so far as the foreign coals are concerned upon which the Western Fuel Company paid duty during the months indicated by those statements, that is, from and including the month of April, 1906, to and including the month of December, 1906, the weight of coal contained in these statements is the weight upon which the duties were paid; in other words, the ascertained weight; that is correct, is it?

A. That is correct.

(Testimony of D. C. Norcross.)

Q. And is not the invoice or bill of lading weight, excepting in those cases, if there were any such cases, in which the invoice or bill of lading weight agreed with the ascertained weight?

A. That shows the custom-house weight of the coal.

Mr. ROCHE.—I think we had probably better have these marked separately, Mr. Clerk. I will offer all of [122—68] these statements at the one time, Mr. McCutchen, subject to your objection, of course, and it may be stipulated that the objection applies to each one.

Mr. McCUTCHEN.—Yes, and an exception.

(The documents were here marked "U. S. Exhibits, 24 to 42, inclusive, respectively.")

Mr. ROCHE.—Q. Now I direct your attention to what purports to be statements of coal received from and commencing with the month of January, 1907, to and including the month of December, 1907, twelve representing the coal received by the Western Fuel Company at its San Francisco depot and the other twelve purporting to indicate the coal received by the Western Fuel Company during that year at its depot at Oakland, and I ask you whether those statements correctly show for each month the coal received at the San Francisco depot and the coal received at the Oakland depot? A. That is correct.

Q. And these statements altogether represent and show all coal from all sources received by the Western Fuel Company in the State of California during that year; that is, during the year 1907? A. Yes.

Q. And so far as the imported coals are concerned,

(Testimony of D. C. Norcross.)

the weights are based not upon the invoice or bill of lading weight, but upon the custom-house weight or ascertained weight?

A. Upon the custom-house weight.

Mr. ROCHE.—We offer these in evidence, subject to the same objection. Do I understand, Mr. McCutchen, that it is your desire that these be extended in the notes?

Mr. McCUTCHEN.—I should think not.

(The documents were here marked, "U. S. Exhibits 43 to 66, [123—69] inclusive, respectively.")

Mr. ROCHE.—Q. Now, I direct your attention to another batch or bundle of statements purporting to show coal received by the Western Fuel Company at its San Francisco depot and also coal received during the year 1908 by the Western Fuel Company at its Oakland depot and ask you to examine those statements and state whether they are the monthly statements for the year 1908 showing all coal received at the San Francisco depot and also at the Oakland depot? A. That is correct, 1908, coal received.

Q. And these weights are based, are they not, upon the ascertained or custom-house weights, so far as the coal is concerned? A. Yes.

Q. And not upon the invoice weights or bill of lading weights, unless they agree with the ascertained weight?

A. They are the invoice weights so far as we are concerned.

Q. You say they are the invoice weights so far as you are concerned, but were not the weights repre-

(Testimony of D. C. Norcross.)
sented by the invoices?

A. On all foreign coal we buy on the custom-house weights, and that is what is invoiced to us, by the custom-house weights.

Q. So far as the weights contained in these statements are concerned, they are the custom-house weights, or the ascertained weights, are they not?

A. The amounts invoiced to us.

Q. You do not want to be understood as saying that they are the weights contained in the invoice at the [124—70] time the coal leaves the foreign port?

A. Well, I don't know about that.

Q. Or the bill of lading weights? A. No.

Mr. ROCHE.—We offer these statements in evidence.

Mr. McCUTCHEN.—Haven't you a summary of these statements, Mr. Roche?

Mr. ROCHE.—We will prove that when we put Mr. Tidwell on the stand. I have to lay the foundation first.

Mr. McCUTCHEN.—I thought the witness probably had furnished you with a summary.

Mr. ROCHE.—Q. Now, I direct your attention to another batch of monthly statements and ask you to examine them and state whether these monthly statements show all coal of every kind, character and description whatsoever received by the Western Fuel Company for each calendar month for the year 1908 both at the San Francisco depot and at the Oakland depot.

Mr. McCUTCHEN.—Can't you shorten this, Mr.

(Testimony of D. C. Norcross.)

Roche, by offering all the other years at the same time?

Mr. ROCHE.—There are only one or two years. I will do that, however. I wanted to call his attention to some other matters.

A. Yes, these are correct.

Q. And your evidence, so far as weights are concerned, indicated on these records, would be the same as you have already given with relation to the other statements? A. Yes.

Mr. ROCHE.—We offer these.

(The documents were here marked "U. S. Exhibits Nos. 67 to 90, inclusive, respectively.")

Q. Now, I direct your attention to three other batches of these statements, one relating to the year 1910 [125—71] and the other relating to the year 1911 and the other relating to the year 1912, and I ask you to examine these statements and state whether they show all coal received from every source by the Western Fuel Company in the State of California, during those three respective years?

Mr. STANLEY MOORE.—Mr. Roche, the witness knows that these statements were all furnished by the company, and if you have examined them and know that they are there, what is the use of going over that with every one of those batches?

A. Well, I counted them all; I know they are correct.

Mr. ROCHE.—It is stipulated that these statements are the statements for these three years and

(Testimony of D. C. Norcross.)

represent all coal received, subject of course to your correction.

Mr. McCUTCHEON.—Yes.

Mr. STANLEY MOORE.—And it is stipulated that they are all there.

Mr. ROCHE.—And in order to facilitate the work of the clerk I suppose these may be numbered in batches; that is to say, these three years which I have just questioned the witness about may be numbered in batches?

Mr. McCUTCHEON.—Yes. Mr. Roche, that should be with the qualification heretofore stated by you, that the weights indicated on those statements are custom-house weights?

Mr. ROCHE.—So far as imported coal is concerned, yes. By custom-house weights you mean the coal weighed at the time it was discharged at the San Francisco and the Oakland ports?

Mr. McCUTCHEON.—Yes. [126—72]

(The three batches of statements just referred to were marked as follows: "For the year 1909, U. S. Exhibit No. 91; for the year 1910, U. S. Exhibit No. 92; for the year 1911, U. S. Exhibit No. 93.")

A similar statement for 1912 was introduced in evidence and marked U. S. Exhibit 94.

Q. Now, I want to direct your attention to two or three of these statements, particularly to the statement for the month of June, 1906; referring to "U. S. Exhibit No. 29" I call your attention to the following: "O R ex-barges 559 tons, 367 lbs." I ask you to explain that item.

(Testimony of D. C. Norcross.)

A. That is an overrun, total overrun of deliveries out of barges for that month.

Q. For what month?

A. For the month of June, 1906.

Q. What do you mean by overrun?

A. I mean excess reported over weights reported having been in the barges.

Q. Then that item explained means this, that 559 tons of coal were taken off the barges more than placed into the barges during the month of June, 1906? A. I do not know that it does.

Q. Well, what does it mean?

A. It means that Mr. Mills reported having taken off that much more than he reported having taken in.

Q. And Mr. Mills is your dock superintendent?

A. Yes.

Q. Then the explanation of that item is, that Mr. Mills, he being one of the defendants in this case, reported to the company that he took off the barges 559 tons and 367 lbs. more coal than was put on to the barges? A. That is right.

Q. I just want to call your attention to two or three of these items, Mr. Norcross, because I suppose your [127—73] explanation will be the same as to all of them. A. It probably will.

Q. In the month of September, 1906, picking out a typical case, or one that may be a little bit exaggerated, I see on this statement of coal received is "O R 769 tons, 1741 lbs."; will you just look at that item please and state to what that refers?

A. I don't know whether that was a yard overrun

(Testimony of D. C. Norcross.)
or a barge overrun; it don't state.

Q. In any event it is an overrun?

A. An overrun of coal, yes.

Q. Of how much coal?

A. 769 tons, 1741 lbs.

Q. Did Mr. Mills likewise have charge and supervision over your yard? A. No.

Q. Who is the superintendent of your yard?

A. Mr. Miller.

Q. This overrun would be based upon reports returned by Mr. Mills and by Mr. Miller, or one of them; is that correct? A. Yes.

Q. And it was based upon the report that there was sold 769 tons, 1741 lbs. coal more than coal received?

Mr. McCUTCHEON.—I object to that as leading and suggestive; the witness has not said that.

Mr. ROCHE.—Very well, I will withdraw that question.

Q. Explain that item?

A. It means there was an excess of coal on hand over the amount called for by the book record by that many tons, if it was yard business.

Q. And if it was barge business it would be subject to the explanation that was made by you a few minutes ago relating to another item? [128—74]

Mr. McCUTCHEON.—I object to that as calling for the guess of the witness.

A. It means that Mr. Mills reported that much more out than he charged himself on his books with having taken in.

(Testimony of D. C. Norcross.)

MR. ROCHE.—Q. For the month of July, 1906, there is an item, "Overrun ex-barges, 237 tons, 298 lbs"; that is an item which would be susceptible of the explanation which you have just given?

A. Yes.

Q. That is correct, is it not?

A. Yes, that is correct.

Q. And taking the month of August, 1906, I notice this item: "Ex-barges 158 tons, 1572 lbs"; that likewise would be explained by the same sort of an explanation? A. Yes.

Q. Let me direct your attention to the month of October, 1906; I notice that there are three items of overrun here; "Overrun 808 tons"; what sort of an overrun is that, Mr. Norcross?

A. It don't say; right under it is a barge overrun, it might have been a yard overrun, a cleanup of the yard pile.

Q. You say a cleanup of the yard pile; what does that mean?

A. It means if we put so many tons of coal in there and it lay there for months, or for a year or so, and we came to clean it up there might have been an excess in delivering that quantity of coal.

Q. Let me see if I get that correctly; is it your understanding that that does represent a yard overrun because there is also a barge overrun upon this statement?

A. And right under it, yes. [129—75]

Q. As I understand it, your explanation is that that represents that upon a cleanup in the yard there

(Testimony of D. C. Norcross.)

were 808 more tons taken out of the yard than your records showed were placed into the yard?

A. There was that much more coal in there than our books called for.

Q. That is, there were 808 more tons of coal in the yard and that had been taken out than your books called for; is not that correct?

A. It might still be in there; if we put in 3,000 tons, and our books showed that we were cleaned up, they would show 3,000 tons; or suppose we put in 10,000 tons, and we sold 10,000 tons, and we found we still had 808 tons on hand, that would be the overrun.

Q. Does this represent the coal on hand or does it represent that your yard was cleaned out by the sale of all the coal that you had, and that you sold 808 more tons from the yard than you put into the yard?

A. No, not necessarily.

Q. It could be susceptible to that sort of an explanation, couldn't it?

A. It could be if it were all cleaned out.

Q. Then it is one of two things; it either represents that after you sold all of the tons of coal that your books showed should have been or were placed in the yard, you still had 808 tons on hand, or that you sold 808 more tons from the yard than your books showed you had placed in the yard; is not that correct?

A. That is correct.

Q. I call your attention to another item upon the same statement for that same month of October. It must have been a cleanup month. Will you read that record, please? [130—76]

(Testimony of D. C. Norcross.)

A. "October 31, 1906, overrun, 1166 tons, 314 lbs."

Q. Can you state from this statement where that overrun occurred?

A. In October, 1906, probably at Folsom Street.

Q. Would that be the Folsom Street Dock?

A. No, in the yard.

Q. And in what yard, in your judgment, would this other overrun be?

A. There are two kinds of coal, are there not?

Q. Yes.

A. We had some very very large piles of coal in there on hand at that time.

Q. In the Folsom Street yard?

A. In the Folsom Street yard, yes. They were threatening to burst out into flames, there were signs of fire there and we turned a lot of hose in there. I think it was at that time. I know I had to put pipe in there and get water on it to keep down the heat and keep it from burning up.

Q. And you sold the coal after it had been wet?

A. Yes.

Q. And in selling the coal after the water had been placed on it, in view of these records, you evidently did not make any allowance for the water?

A. Not unless it ran off of it.

Q. So if the increased weights were due to water, of course the water was weighed with the coal at the time the coal was sold? A. Yes.

Q. Would you say that this overrun of 1166 tons, 314 lbs. also related to the coal which was contained in the same yard in which the other overrun appeared of some 808 tons?

(Testimony of D. C. Norcross.)

A. It probably was. I think most of our coal was [131—77] at that point at that time. The stock was getting down pretty low.

Q. Coal was selling very rapidly for some months after the fire, was it not?

A. Yes, I think that was the cleanup for a year's business.

Q. It would take a whole lot of water, would it not, put on top of coal to make an overrun of 1900 tons?

A. It would depend on how much coal you were handling.

Q. Well, all the coal in your yard?

A. It would not be the coal in the yard for one day or for one month, it would be the coal in the yard for one year, coal that had been passing through there and that had been stored.

Q. In the same month upon which these two overruns appear of 808 tons and 1166 tons also appears another overrun, "Ex-barges, 240 tons, 2065 lbs."; that is overrun during the month of October, 1906, that overrun relates exclusively to overrun upon the barges, does it not? A. Upon the barges, yes.

Q. You do not recall any danger of spontaneous combustion of coal on the barges during that month, do you, Mr. Norcross?

A. Well, there have been some, but I don't remember any for that month.

Q. Without going into all these statements, Mr. Norcross, your explanation of all items similar in kind appearing upon these other monthly statements would be the same as you have already given?

(Testimony of D. C. Norcross.)

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And it is also correct, is it not, Mr. Norcross, that in nearly each one of these monthly statements relating [132—78] to San Francisco there does appear some overrun, either as to the yard or as to the barges?

A. I think it is a pretty general thing.

Mr. ROCHE.—Of course, it may be considered, gentlemen, that all these statements have been read?

Mr. McCUTCHEN.—Oh, yes.

Mr. ROCHE.—Q. Mr. Norcross, the Western Fuel Company did keep during each month of the time that it was engaged in business and still keeps a monthly statement of coal sold, does it not?

A. Yes.

Q. Both in Oakland and in San Francisco?

A. Yes.

Q. And those monthly statements show every lb. of coal sold by the Western Fuel Company, first to the San Francisco depot, and secondly, the Oakland depot? A. Yes.

Q. And both together they show all of the coal sold by the Western Fuel Company which it receives or imports into the State of California? A. Yes.

Q. Where are those sales-sheets?

A. The summaries are in the summaries of coal receipts, sales and the balance on hand, which you have.

Q. Where are the monthly sheets themselves, do you know?

A. I did not know you wanted those. I told Mr.

(Testimony of D. C. Norcross.)

Tidwell they were embraced in the coal statement and he said that that was all he wanted instead of the details.

Q. Can you arrange to have those sheets sent up here tomorrow morning? A. Yes.

Q. And those sheets do show, as you have already indicated, all of the coal sales?

A. Yes, it is just what you have on those there. Mr. Roche, if you will pardon me [133—79] a minute, I believe you have those statements, you have the detail statements of all coal sales.

Q. No, we have not got them, Mr. Norcross.

A. I think they were prepared to be sent up here and I sent them up in that load.

Q. We have not been able to locate them.

A. I will find them for you then; they are up here.

Mr. ROCHE.—Will you stipulate, gentlemen, subject of course to correction, if it is hereafter discovered that any of these statements are not here, that the statements which I now hold in my hand are statements showing a summary of receipts, sales and profits during each calendar month, commencing with the month of May, 1906, down to and including the 31st day of December, 1912?

Mr. McCUTCHEON.—These are statements that came from the witness?

Mr. ROCHE.—Yes, statements that came from the Western Fuel Company's office.

Mr. McCUTCHEON.—They were made from month to month, were they, as the transactions took place?

Mr. ROCHE.—I will ask Mr. Norcross: Q. These

(Testimony of D. C. Norcross.)

statements, Mr. Norcross, which I hold in my hand, are statements which were compiled in the office of the Western Fuel Company from month to month?

A. Yes.

Q. Showing the total receipts and sales of coal, also the profits? A. Yes.

Q. Both for the San Francisco depot and for the Oakland depot? A. Yes.

Q. But they do not show the tonnage of coal?

A. Yes, they show the tonnage on hand on the [134—80] first of the month, and its value.

Q. In other words, they simply show totals?

A. The total tonnage of each kind of coal and the total tons sold.

Q. Let me call your attention to the exhibits already introduced in evidence and marked "U. S. Exhibits 22 and 23"; each of those statements are similar in kind as those two exhibits? A. Yes, sir.

Q. The overruns to which you have already testified are not specifically set forth in any of these statements, are they?

A. No, there is no detail in these; it is the total of each kind of coal.

Q. The totals in each one of these statements includes the overruns which appear upon the detail statements? A. Yes.

Q. And likewise disclose the value of the overage and the sale of the total coal, including the overage?

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And likewise the profit derived by the Western

(Testimony of D. C. Norcross.)

Fuel Company from the sale of coal for each calendar month during this period of time, including the sale of overage coal? A. The gross profit.

Mr. ROCHE.—We offer these in evidence.

Mr. McCUTCHEN.—In that connection, Mr. Roche, you don't claim that any of these defendants ever saw any of those statements, do you? [135—81]

Mr. ROCHE.—I am not making any contention of that kind, may it please the court.

Mr. McCUTCHEN.—I am asking you that in connection with your offer, if you claim that any of the defendants ever saw any of these statements.

Mr. ROCHE.—We expect to show, may it please the Court, before we conclude this case, although it is not relevant at this time according to our theory of the case, that certain of the defendants not only saw the statements but were apprised of their contents; in fact, as the evidence already shows, these statements were built upon the figures furnished by Mr. Mills himself.

Mr. McCUTCHEN.—Do you expect to show that any of the other defendants, other than Mr. Mills, saw them?

Mr. ROCHE.—We certainly expect to show that the directors of the Western Fuel Company saw some of these statements, but that in law they were charged with knowledge of the statements. And in addition to that, so that counsel may understand what our position is, we intend to show that their attention was directed to these overruns. And I think we will

(Testimony of D. C. Norcross.)

show that before the witness on the stand leaves the stand.

Mr. McCUTCHEN.—We make the same objection to these papers as to the others.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—An exception.

Mr. DUNNE.—Mr. Roche, do these last statements put in by you publish upon their face any reference to overruns as such?

Mr. ROCHE.—No. [136—82]

Mr. DUNNE.—Then I understood you to say, and Mr. Norcross apparently to acquiesce in the statement, that this last bunch of statements showed or included the value of overage?

Mr. ROCHE.—That is correct.

Mr. DUNNE.—But that is not expressed upon the face of the statement.

Mr. ROCHE.—Oh, there is no question about that at all.

Mr. DUNNE.—I want that made perfectly clear.

Mr. ROCHE.—There is no question about that at all. Mr. Norcross testified that the details of the overruns appeared on the other statements we offered in evidence, and the details of the last exhibits included the overruns, the value of the overruns, and showed a sale of overruns, but the fact that they were overruns was not specifically shown on the face of those documents.

Mr. DUNNE.—I did not want any such implication to lurk in your question or in his answer. That is all.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—I did not think there was any question about that, Mr. Dunne; I thought I made it perfectly clear.

(A book is here shown the witness.)

That is the first minute book of the Western Fuel Company. I did not attend the first meeting myself. After I became Secretary the minutes were written up by my stenographer. The minutes which appear on page 60 are those of the meeting of March 11, 1904, and were dictated by me.

(Admitted by the prosecution that Mr. Bruce was not at that time a member of the board of directors.)

[137—83]

(An extract from said minutes was read in evidence showing the directors present to be Jno. L. Howard, Sidney V. Smith, Joseph L. Schmitt, James B. Smith, and showing the complete annual statement for the year ending December 31, 1903, and the statement for the month of January, 1904, to have been submitted and ordered placed on file. A document entitled "Western Fuel Co., annual statement for the year 1903," was shown the witness who stated that that document was submitted to said meeting of the board of directors, and is the statement referred to in the minutes. The jury's attention was directed to the following among other items appearing in said statement: "By overrun on Nanaimo coal at San Francisco \$9221.20.")

Nanaimo coal was the coal which was exclusively imported by the Western Fuel Company from Nanaimo. The item of overrun in the annual statement of

(Testimony of D. C. Norcross.)

1903 represented that the Western Fuel Company had on hand on the 31st of December, 1903, \$9221.20 worth of Nanaimo coal more than its books show that it ought to have had. The book value of said Nanaimo coal was about \$5 a ton so that said overrun would represent approximately 2,000 tons. (The document was here introduced in evidence and was here marked "United States Exhibit Number 96.")

(The witness' attention is here directed to another statement appearing on page 19 of the annual statement, United States Exhibit Number 96 and to the items "Total profits on sales \$93,196.66; add overrun at San Francisco \$1,874.94.) That is a statement of the abstracts of the coal sales at Nanaimo depot and shows the shipments of coal from Nanaimo to San Francisco and that the Government weighed \$1874.94 worth of coal more than Nanaimo claimed to have loaded into the vessels. That is to say, that [138—**84**] the coal which was imported by the Western Fuel Company from Nanaimo into the port of San Francisco exceeded by the custom-house weight the amount of money specified in value more than the coal was invoiced at at Nanaimo. In other words, in 1903, the boats coming here from Nanaimo containing the coal of the Western Fuel Company mined at Nanaimo and discharging at San Francisco discharged more coal than the invoice showed they contained, so that instead of there being a shortage in the coal imported by the Western Fuel Company from Nanaimo of any kind there was an overage. There was more coal discharged than the invoice or

(Testimony of D. C. Norcross.)

bill of lading called for at Nanaimo.

These minutes truly record the events as they actually occurred and truly set forth the number of directors present at the meeting and my testimony in this regard would be the same for all the minutes as for the particular minutes which have been above read. (Stipulated here by the defendants that the proper foundation has been laid for all the minutes.)

(There were here read in evidence extracts from the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified showing James B. Smith among other directors to have been present at each said meetings owing that the previous minutes of the Board of Directors then remaining unapproved were read and approved and showing also in the language below quoted the adoption and filing of certain monthly statements:)

May 17, 1904. (Special meeting.)

"The regular monthly statements for the month of March, 1904, were submitted, approved and ordered placed on file."

August 17, 1904. (Special meeting.)

"The regular monthly statements for the months of April, May and June were submitted and ordered placed on file." [139—
85]

December 23, 1904. (Special meeting.)

"The financial and business statements of the company for the months of September and October were submitted to the directors and

(Testimony of D. C. Norcross.)

explained, and were afterwards accepted by the board."

That explanation was undoubtedly made by Mr. Howard, the President.

March 23, 1905. (Special meeting.)

"The financial and business statements for the months of November and December, 1904, were submitted, and on motion duly seconded, were ordered placed on file."

It was the custom at the end of each year to submit the annual statement to the board of directors which annual statement would be examined and approved by them before it was submitted to the shareholders; the annual statements would then be read by the President and adopted, and then presented to the shareholders, so that the annual statement, for instance, for 1903, United States Exhibit Number 96, was, as I remember (the minute-book will show), not only submitted to the directors, but also to the stockholders at the latter's regular annual meeting. These annual statements are prepared by the President. He writes the report part of them. (The second annual report of the Western Fuel Company for the year ending December 31, 1904, is here introduced in evidence as "United States Exhibit Number 97.") The attention of the witness was directed to the following item appearing under date December 31, 1904: "Overrun on coal sold joint account, \$739.94.") That item represents an excess of outturn of coal on the joint agreement that the Western Fuel Company had with the Wellington Collier Com-

(Testimony of D. C. Norcross.)

pany which was entered into in July. We sold them our coal as it stood in the yard subject to adjustment [140—86] on the final out-turn and there was an excess of some \$700 worth of coal. That coal was sold at \$5 a ton. Outside of the items to which my attention has been heretofore directed as contained in the annual statement for 1903 showing an overrun, overruns are included in the profit and loss account in the annual statement. The monthly statements for the years 1904 and 1905, and up to April, 1906, were destroyed in the fire and are not now in existence and there is no data in existence excepting the dock books showing overruns so far as profits are concerned. There probably were some overruns during the year 1904. The overrun for 1904 is embraced or included in the profit and loss account, if there was an overrun. The profit derived from the sale of excess coal or overrun coal would be embraced in the item: "Coal account earnings, \$33,894.97." There are no annual statements outside of those which you, Mr. Roche, hold in your hand now, being the statements for 1903 and 1904, showing in detail the total annual overrun. The President, or whoever was presiding, would in a general way explain the business of the month at the directors' meetings, and of the year at the stockholders' meetings. If any questions were asked he would answer them, and explain them.

(Counsel for the prosecution here read in evidence an extract from the adjourned annual meeting of the

(Testimony of D. C. Norcross.)

stockholders of the Western Fuel Company of March 23, 1905, in which the following statement appears: "The President read the directors' report of the operations of the company for the year ending December 31, 1904, submitting statements thereof."

(There were here read in evidence extracts from the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified [141—87] showing James B. Smith, among other directors, to have been present at each said meeting, showing that the previous minutes of the board of directors not theretofore approved were approved, and showing also in the language below quoted the adoption and filing of certain monthly statements:

July, 14, 1905. (Special meeting.)

"The financial statements for the months of April and May were submitted and explained by the President and, on motion duly seconded were ordered placed on file."

September 20, 1905. (Special meeting.)

"Financial and business statements for the months of June and July, 1905, were submitted and explained by the President, and, on motion duly seconded, were ordered placed on file."

November 14, 1905. (Special meeting.)

"The balance sheets and earnings and expense statements for the month of September and for the nine months ending September

(Testimony of D. C. Norcross.)

30th, were presented, and, on motion duly seconded, were ordered placed on file."

April 17, 1906. (Special meeting.)

"The financial and business statements for the months of January and February, 1906, were submitted and, on motion duly seconded, were ordered placed on file."

(Admitted by defendants that the document now shown them is the annual statement for the year ending December 31, 1906. Same offered in evidence and considered as having been read. The following extract therefrom read to the jury by the prosecution. [142—88]

"A mine output of 1500 tons per day, which at other periods was comfortable, became at once quite inadequate, and steamship trade, which ordinarily would have been welcome, caused temporary heart-ache because it diverted coal from customers who would have paid us double the rates per ton."

Mr. OLNEY.—Mr. Roche, will you just read what went before that; if you do, I think it will explain that whole transaction.

Mr. ROCHE.—"The coal trade at San Francisco experienced two extreme conditions during the past year.

"The destruction of houses during the April fire caused such a shrinkage in the demand for domestic coal that in June we felt obliged to curtail our productive capacity by closing the Northfield mine. Storage yards were congested and we found tempo-

(Testimony of D. C. Norcross.)

rary employment elsewhere for some of our chartered steamers.

“After October, owing to the curtailment of supplies from Australia, Wyoming, Utah, and Washington, and to the revival of the demand, there came a veritable coal famine.

“The northern territory was visited with severe weather, and the calls upon the mines were greatly increased.

“Many foreign steamers, with whose owners we had bunkering contracts, happened to call upon us at this inopportune period, and we were obliged to supply their wants greatly to the delay of our own steamers, and to our detriment in this market.”

I suppose you gentlemen will concede that that reference relating to bunkering contracts were some of them with the Pacific Mail Steamship Company and to American bottoms foreign bound? [143—89].

Mr. OLNEY.—I think not.

Mr. ROCHE.—(Reading:) “The local steamship companies likewise made heavy calls upon us, and it really resulted in our being able to supply the domestic trade with the surplus after these other demands had been satisfied.

“A mine output of 1500 tons per day, which at other periods was comfortable, became at once quite inadequate, and steamship trade, which ordinarily would have been welcome, caused temporary heart-ache because it diverted coal from customers who would have paid us double the rates per ton.”

I suppose the double rates refer to domestic customers.

(Testimony of D. C. Norcross.)

Mr. McCUTCHEON.—And I suppose you will admit that the report was read to the stockholders in full?

Mr. ROCHE.—I understand that it was, and I understand that among the stockholders were practically all of the defendants.

(The document is here marked "United States Exhibit No. 98.")

(There was here read in evidence an extract from a special meeting of the board of directors of the Western Fuel Company—page 17 of minute-book 2,—for May 16, 1907, showing James B. Smith, among other directors, present and containing the following statement: "Statements for the quarter ending March 31, 1907, showing the results of the business for that period were submitted and on motion were ordered placed on file"; also an extract from the special meeting of the board of directors of the Western Fuel Company for February 4, 1905, page 31, of the minute-book 2, showing James B. Smith, among other directors, present and containing the following statement: [144—90] "The President submitted the annual report of the President to the stockholders of the company for the fiscal year ending July 31, 1907, which was duly adopted and, on motion, was ordered submitted to the stockholders—said annual statement for said year 1907 was introduced in evidence as "United States Exhibit Number 99," and it was conceded by the defendants that that report was read to the stockholders' meeting of that year.)

(There were here read in evidence extracts from

(Testimony of D. C. Norcross.)

the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified showing James B. Smith, among other directors, to have been present at each said meeting and showing also in the language below quoted the adoption and filing of certain monthly statements:

April 15, 1908. (Special meeting.)

“February monthly statements were submitted and, on motion * * * they were ordered placed on file.”

May 1, 1908. (Regular monthly meeting.)

“Statements and balance sheet for the month of March were submitted and, on motion, were ordered placed on file.”

June 12, 1908. (Regular monthly meeting.)

“The regular monthly statements and balance sheet for the month of April were submitted and, on motion duly seconded, were ordered placed on file.”

June 25, 1908. (Regular monthly meeting.)

“Statements for the month of May were submitted and ordered placed on file.” [145
—91]

July 22, 1908. (Regular monthly meeting.)

“Statements for the month of June, 1908, were submitted and on motion were ordered placed on file.”

September 10, 1908. (Special meeting.)

“Statements with balance sheets showing the results of the company’s business to Ju'y

(Testimony of D. C. Norcross.)

31, 1908, were submitted and on motion
* * * were accepted and ordered placed
on file."

September 30, 1908. (Special meeting.)

"Statements for the month of August were
submitted and * * * were accepted and
ordered placed on file."

November 4, 1908. (Special meeting.)

"Statements for the month of September
were submitted and * * * were accepted
and ordered placed on file."

(At this point the following proceedings were had:

"Mr. McCUTCHEON.—I suppose it may be understood as we go along, Mr. Roche, that none of the statements that you have heretofore offered are the business and financial statements referred to in these minutes?

Mr. ROCHE.—Of course not, I cannot admit that may it please the Court, because in the first [146—92] place, our information is otherwise, and in the second place, I am satisfied that counsel, upon investigation, will himself concede that to be true. We have put in here not only the financial statement, but likewise the monthly statements showing the monthly balance upon hand. In any event, some of these exhibits must have been the exhibits which were submitted to the board of directors, and according to the minutes it would apparently appear that all these statements were submitted to the board of directors.

'Mr. McCUTCHEON.—You do not claim that these

(Testimony of D. C. Norcross.)

statements are the business and financial statements referred to in these minutes?

Mr. ROCHE.—Certainly, we do.”)

December 7, 1908. (Special meeting.)

“Statements showing the results of the company’s business for the month of October were submitted and, on motion * * * were accepted and ordered placed on file.”

February 18, 1909. (Special meeting.)

“The President then read the directors’ annual report to the stockholders for the year ending December 31, 1908, which was unanimously approved and * * * was ordered placed on record and to be submitted to the stockholders at the annual meeting to be held Tuesday, February 23, 1909.”

February 23, 1909. (This was a stockholders’ and not a directors’ meeting.) [147—93]

“The President read the directors’ 6th annual report to the stockholders which, on motion * * * was accepted and ordered placed on file.”

March 10, 1909. (Special meeting.)

“Statements showing the result of the company’s business for the month of January were submitted and ordered placed on file.”

March 20, 1909. (Special meeting.)

“Statements for the month of February were submitted and on motion * * * were ordered placed on file.”

(Testimony of D. C. Norcross.)

April 29, 1909. (Special meeting.)

“Statements for the month of March, 1909, were submitted and * * * were accepted and ordered placed on file.”

June 7, 1909. (Special meeting.)

“Statements for the month of April were submitted and ordered placed on file.”

July 14, 1909. (Special meeting.)

“Statements for the month of May, 1909, were submitted and * * * accepted and ordered placed on file.”

August 3, 1909. (Special meeting.)

“Statements for the month of June, 1909, were submitted and * * * accepted and ordered placed on file.”

September 27, 1909. (Special meeting.)

“Statements for the month of August were submitted and ordered placed on file.” [148

—94]

December 9, 1909. (Special meeting.)

“Statements for the month of October, 1909, were submitted and ordered placed on file.”

December 30, 1909. (Special meeting.)

“Statements for the month of November were submitted and ordered placed on file.”

February 1, 1910. (Special meeting.)

“Statements for the month of December were submitted and ordered placed on file.”

February 1, 1910. (This is a meeting of the stock-holders and not of the directors.)

(Testimony of D. C. Norcross.)

(Here stipulated and agreed by counsel for the defendants that the prosecution might have portions of such further minutes of the meetings of the board of directors of the Western Fuel Company as they might desire to read into evidence, copied off by a stenographer and offered and read in evidence, such extracts to show the directors present and the statements adopted.)

D. C. NORCROSS was here recalled for further direct examination.

The monthly statements similar to those yesterday offered in evidence, but covering the period January 1, 1904, to April 1, 1906, were destroyed in the fire except perhaps the statement for March, 1906. The annual statements, however, are all in existence.

At this point the following proceedings were had:

“Mr. McCUTCHEN.—In that connection, would it not be appropriate that you have the witness explain what he means by monthly financial statements, so that the jury may have it in mind?

Mr. ROCHE.—We will go into that matter later. So [149—95] that there will be no question about our position, we intend to claim in the first place that the board of directors were charged with the knowledge of these records in the first place, and in the second place that the monthly statements that have been heretofore introduced in evidence are the monthly statements referred to in these minutes, and which were from time to time called to the attention of the board of directors.

Mr. McCUTCHEN.—I only suggested to you in

(Testimony of D. C. Norcross.)

order to clear any doubt on that subject, that you ask the witness, so that the jury might have it in mind as they went along. I am not asking what your claim is."

(Here stipulated that prosecution may offer in evidence extracts from the minutes of the stockholders of the Western Fuel Company for the meetings from and including the year 1904 to and including the year 1912.)

(The prosecution here read in evidence an extract from the meeting of the stockholders of March 11, 1904, as follows:)

"San Francisco, March 11, 1904. The monthly meeting of the directors of the Western Fuel Company was held at its office, 318 California street, April 11, 1904. Present: Messrs. John L. Howard, James B. Smith, Sidney V. Smith, and Joseph L. Schmitt. Absent: Mr. J. C. Wilson."

Mr. McCUTCHEON.—May we ask, for our information, whether you offer that as evidence of the formation of a conspiracy or as evidence of the execution of a conspiracy already formed?

Mr. ROCHE.—We offer it as a part of the conspiracy; in other words, we desire, may it please the Court, among other things to show motive, and we desire to show, may it please the [150—96] Court, one of the reasons why this conspiracy was formed, and one of the reasons why the conspiracy was called forward, was so that the profits resulting to these defendants as a result of that conspiracy could be collected and retained by them.

(Testimony of D. C. Norcross.)

"Mr. James B. Smith moved and Mr. J. L. Schmitt seconded, that dividend No. 4 of 2½ per cent on the issued capital stock of the company be declared."

(Counsel for the prosecution here read in evidence extracts from the minute-books of the Western Fuel Company for meetings held on the dates below specified at each of which meetings James B. Smith was among the directors present and, unless otherwise indicated, voted for the dividends below specified, which dividends were declared upon the entire issued capital stock of the company :)

October 29, 1904 2½% Dividend No. 5

(It was at this point stipulated that the capital stock of the Western Fuel Company was and is \$1,000,000.)

February 13, 1905	2½%	Dividend No. 6
May 5, 1905	2½%	Dividend No. 7
October 16, 1905	2½%	Dividend No. 8
December 15, 1905	2½%	Dividend No. 9
February 23, 1906	2½%	Dividend No. 10

(On motion, duly seconded, the following resolution was unanimously adopted: Whereas, the Western Fuel Company has invested a large amount of its net earnings in mine improvements and in the shares of companies whose products it controls; resolved, that in order to increase its [151—97] paid up capital to the amount of \$1,000,000 shares to the amount of 409 be disposed of to share-owners in the proportion of the present holdings, and at the rate of \$100 per share; that

(Testimony of D. C. Norcross.)

subscriptions for said allotment shall be payable not later than 28th February next, and that any shares not subscribed shall be sold to the share-owners making the highest bid at not less than \$100 a share.)

August 9, 1906.	2½%	Dividend No. 12.
December 21, 1906.	2½%	Dividend No. 13.
March 25, 1907.	2½%	Dividend No. 14.
May 16, 1907.	2½%	Dividend No. 15.
May 16, 1907.	2½%	Dividend No. 16.
September 6, 1907.	2½%	Dividend No. 17.
September 28, 1907.	2½%	Dividend No. 18.
March 30, 1909.	2½%	Dividend No. 19.
December 9, 1909.	There being no declaration of dividend between March and December of 1909,—“It was resolved that a dividend of 2½% of the entire capital stock issued be and it is hereby declared and made payable on December 23, 1909.”	

March 23, 1910.	2½%	Dividend No. 21.
June 28, 1910.	2½%	Dividend No. 22.

(Mr. James B. Smith was absent from this meeting.)

September 22, 1910.	2½%	Dividend No. 23.
December 21, 1910.	2½%	Dividend No. 24.

[152—98]

March 4, 1911.	2½%	Dividend Number 25.
June 12, 1911.	2½%	Dividend Number 26.
September 28, 1911.	2½%	Dividend Number 27.
November 29, 1911.	2½%	Dividend Number 28.
February 29, 1912.	2½%	Dividend Number 29.

(Testimony of D. C. Norcross.)

May 22, 1912. Concerning this meeting, the following extract from the minutes was read in evidence: "Directors present: Mr. John L. Howard, Presiding; Messrs. James B. Smith, Robert Bruce, J. R. Pringle, and Joseph L. Schmitt; Director Rob't Bruce moved the following: Resolved, that a dividend of five (5) per cent be declared and made payable June 27th, 1912, on the entire capital stock issued. After some discussion Director Bruce amended his resolution to read:

"That a regular dividend of two and one-half per cent and an extra dividend of two and one-half per cent on the entire capital stock issued be declared and made payable June 27, 1912."

After discussion director James B. Smith seconded the amended resolution, whereupon director Jos. L. Schmitt called for a roll-call. Directors Bruce and Smith voted yes; Directors Schmitt, Pringle and Howard voted no. Whereupon the Chair declared the resolution was not carried.

On motion of director Jos. L. Schmitt, seconded by director J. R. Pringle, the following resolution was unanimously adopted: Resolved— [153—99] That a dividend of two and one-half per cent ($2\frac{1}{2}$) being dividend No. 30 on the entire capital stock issued be and hereby is declared and made payable on June 27th, 1912."

(Testimony of D. C. Norcross.)

June 27, 1912. "Mr. Bruce moved the following resolution: Resolved, that an extra dividend of two and one-half ($2\frac{1}{2}$) per cent on the entire capital stock issued be declared and made payable immediately. Mr. James B. Smith seconded this resolution, whereupon Mr. Jos. L. Schmitt called for a vote. Directors Bruce and James B. Smith voted yes, and Directors Sidney V. Smith and Jos. L. Schmitt voted no.

The chair being called upon to vote asked for time to go into the condition of the company more fully.

On motion made and seconded an adjournment was taken to 11 A. M. on Friday, June 28th, 1912."

June 28, 1912. "The Chair explained the company's condition as he found it and the money requirements for the future and said that as the deciding vote for an extra dividend rested with him he would vote in the affirmative providing the motion made would be amended to read: [154—100]

'An interim dividend of $2\frac{1}{2}$ payable on Aug. 1st or Aug. 15th.'

Director Bruce declined to amend the motion, and again offered the following:

'Resolved: That an extra dividend of two and one-half ($2\frac{1}{2}\%$) per cent be and hereby is declared and made payable immediately.'

Director Sidney V. Smith seconded the

(Testimony of D. C. Norcross.)

resolution, whereupon Director Jos. L. Schmitt called for a vote. Directors Sidney V. Smith, Rob't Bruce and Jas. B. Smith voted yes. Directors Howard and Schmitt voted no.

The Chair declared that as a majority of the directors had voted in favor of the resolution it was duly carried.

September 26, 1912. 2½% Dividend No. 32.

November 29, 1912. 2½% Dividend No. 33.

December 27, 1912. "Directors present, Mr. John L. Howard, presiding: Messrs. James B. Smith, Joseph L. Schmitt, Robert Bruce and Sidney V. Smith.

Director Robert Bruce moved the following resolution: Resolved: that an extra dividend of 2½ per cent, dividend No. 34 be and hereby is declared and made payable on December 30th, 1912. Director Sidney V. Smith seconded this resolution, whereupon Director Schmitt called for a vote. On calling the roll all directors, with the exception of Director Schmitt voted 'yes'; Director Schmitt voted 'no'; whereupon the [155—101] Chair declared the resolution adopted."

February 4, 1913. "Directors present: Mr. John L. Howard, presiding; Joseph L. Schmitt, Sidney V. Smith and Robert Bruce; absent, Mr. James B. Smith.

Director Sidney V. Smith proposed the following resolution: Resolved, that a dividend

(Testimony of D. C. Norcross.)

of five dollars per share (Dividend No. 35) on the capital stock issued be and hereby is declared and made payable immediately. Further resolved, that a dividend of five dollars per share (Dividend No. 36) on the capital stock issued be and is hereby declared and made payable on February 28th, 1913.

Director Robert Bruce seconded the foregoing resolution, whereupon Director Schmitt called for a poll of the vote. All directors present voted in the affirmative except Director Schmitt, whereupon the Chair declared the motion carried."

(Here stipulated and agreed by counsel for the defendants that the prosecution may hereafter direct attention to extracts from the minutes of the board of directors which have not already been read into evidence and likewise from the minutes of the stockholders and that such extracts may be considered as having been read and if necessary be read to the jury at the time.) [156—102]

BE IT REMEMBERED that thereupon the following testimony was given and the following proceedings were had:

"Mr. ROCHE.—Q. I direct your attention, Mr. Norcross, to an Annual Statement purporting to be the Annual Statement of the President of the corporation for the year 1909, and ask you if that is the statement. A. That is the statement all right.

* * * * *

The figures were gone over by Mr. Howard before

(Testimony of D. C. Norcross.)

the statement was presented to the board.

Q. I want to direct your attention to an item appearing on the last page of this Annual Statement, as follows: 'By overrun, Australian coal, \$21,875.' To what does that refer?

A. Overrun of coal at the end of 1909.

Q. The Western Fuel Company during that year was, as it had been during prior years, buying Australian coal? A. Yes.

Q. And do you recall approximately the price paid by it for the Australian coal if bought during that year? A. About \$7.50 to \$8.00 a ton.

Q. In other words, the price varied from \$7.00 to \$8.00 per ton? A. Yes.

Q. Was that f. o. b. at the mine, or f. o. b. San Francisco?

A. F. o. b. San Francisco; it was as high as \$8.50 a ton, some of it.

Q. Do you recall that in quite a number of instances the Australian coal was purchased by you f. o. b. mine? [157—103] A. No.

Q. In other words, the vessels in which the Australian coal was imported to the port of San Francisco by the Western Fuel Company were not chartered by the Western Fuel Company?

A. No, we did not import it; we bought it from the importers; we bought it delivered here.

Q. So that so far as the Australian coal is concerned, you had nothing at all to do with the payment of the freight; is that right?

A. No, we had nothing to do with the freight.

(Testimony of D. C. Norcross.)

Q. This item of—

The COURT.—Q. Did you have to pay the duties?

A. No, we bought the coal freight and duty paid.

Mr. ROCHE.—Q. That is, you did not have to pay duty upon the Australian coal? A. No.

Q. That was paid by the Importer or the consignor, where you bought it f. o. b. San Francisco?

A. By the Consignee—the ship.

Q. As I understand your statement, the duty was paid by the Consignor—that is, the seller of the coal?

Mr. McCUTCHEN.—The Western Fuel Company was not the consignee. The consignor is the man who shipped it in Australia; the consignee is the man who brought it here and from him we bought it. He paid the duty.

Mr. ROCHE.—Q. Then your testimony would be that the coal was really bought at San Francisco?

A. That is right.

Q. In other words, the Western Fuel Company would engage to purchase coal from firms in San Francisco [158—104] which would purchase the coal and to whom the Australian coal had been consigned? A. That is correct.

Q. So the consignee would pay the import duty?

A. That is correct.

Q. It is also true, is it not, that the Western Fuel Company paid for that coal on what is known as the out-turn weight?

A. On the custom-house out-turn weight.

Q. That is also known as the out-turn weight, is it not? A. Yes.

(Testimony of D. C. Norcross.)

Q. If the out-turn weight was less than the invoice or bill of lading weight, the Western Fuel Company would pay only upon the out-turn weight?

A. That is all.

Q. And it is also true, is it not, in practically every instance the coal was weighed out of the ship upon the bunkers of the Western Fuel Company?

A. Yes.

Q. With one or two exceptions?

A. How is that—how did you put that?

Q. It was weighed by the Western Fuel Company and the Government weigher upon the Western Fuel scales? A. It was weighed by the Government—

Mr. McCUTCHEON.—Just a minute, I object to that, may it please the Court, as leading and suggestive. Mr. Roche suggests to the witness that the coal was weighed by the Western Fuel Company. The fact is it was weighed by the custom-house weigher and by nobody else.

Mr. ROCHE.—That statement is not exactly accurate, Mr. McCutchen, because it was weighed by both of [159—105] them.

The COURT.—Neither of these statements is evidence, however.

Mr. ROCHE.—Your Honor is correct about that.

Q. At what place would this Australian coal be discharged?

A. At the most convenient wharf, Vallejo street or Mission Street or Folsom Street or at Oakland.

Q. Would it be discharged at the wharves under the control of the Western Fuel Company?

(Testimony of D. C. Norcross.)

A. Yes.

Q. And would it be handled by Western Fuel employees? A. Yes.

Q. And it would be weighed over the scales of the Western Fuel Company, would it not? A. Yes.

Q. And at those scales would be a Government weigher and also an employee—a weigher of the Western Fuel Company A. Yes.

Q. That is correct, too, is it not?

A. That is correct.

Q. The item to which I directed your attention a few moments ago is an item relating to the year 1909, 'by overrun, Australian coal, \$21,875.' I would like to have you explain that item.

A. It is the overrun of coal in excess of the quantity called for by the books to be on hand at that period; after taking stock we found we had that much excess over what our books called for.

Q. Your books called for the out-turn weight, did they not?

A. They called for the intake weight, less the out-turn, the balance.

Q. They called for the intake weight?

A. What we had paid for and put in our yards.

[160—106]

Q. Let me get at that in another way; you testified a moment ago you paid for this coal—and when I say 'you' I mean the Western Fuel Company, upon the out-turn or ascertained weight; is that correct?

A. That is correct.

Q. The entries contained in your books showing

(Testimony of D. C. Norcross.)

the quantity of coal received and the amount paid for that coal would necessarily relate to the out-turn or ascertained weight; is not that correct?

A. The balance.

Q. What do you mean by the balance?

A. I mean that I charge up the out-turn weights of the vessels to our coal account, and I credit our coal account with the sales of coal from all sources and there is a balance on hand called for by the books; when we take an inventory we find we have that much of an excess.

Q. You mean for which you cannot account; is that correct? A. Well, I don't know about that.

Q. Let me get at that another way so as to simplify it; suppose you imported from Australia 10,000 tons of coal at a certain value. I will modify or change that question a little; you have testified that you would purchase this Australian coal from San Francisco firms who would import it and to whom the coal could be consigned; that is correct, is it not?

A. Yes.

Q. And these boats would be discharged at the wharves of the Western Fuel Company? A. Yes.

Q. If the out-turn weight of that coal; that is, the ascertained weight, the weight of the coal upon its discharge from the boat was 10,000 tons, your books would show that you received 10,000 tons of Australian coal, would they not? A. Yes. [161—107]

Q. And if you paid \$8.00 a ton to the consignee, your vendor, for that coal, your books would show that for that 10,000 tons of Australian coal you paid \$80,000; that is correct, is it not?

(Testimony of D. C. Norcross.)

A. That is correct.

Q. Then if this item would apply to that situation it would indicate that at the end of the year you had \$21,875 more Australian coal on hand than the coal which you bought; is not that correct—either on hand or sold? A. Either on hand or sold, yes.

Q. This calculation is based upon the cost price of that coal to you? A. Yes.

Q. So that if the coal cost \$8.00 per ton and \$21,875 was divided by 8, you would have the quantity of coal on hand beyond the quantity of coal which your books showed you should have on hand; is not that correct?

A. That is correct.

Q. Or, in the event that the coal was sold, your books would show you sold that quantity of coal which your books would also show you did not purchase? A. That is right.

Q. In this particular instance, if this coal cost \$8.00, the maximum figure, the overage or overrun would be about 2,700 tons, would it not?

A. I think about that.

Mr. McCUTCHEON.—I think the witness suggested \$8.50.

Mr. ROCHE.—He said from \$7.00 to \$8.00.

A. I don't know what the average would be; that is what that would amount to, though, 2,700 tons.

Q. Approximately that? A. Yes.

Q. What was the Australian coal retailing for at that time?

Mr. McCUTCHEON.—I object to that as immaterial. [162—108]

(Testimony of D. C. Norcross.)

Mr. ROCHE.—I will withdraw the question.

Q. For what price were you selling Australian coal at that time?

Mr. McCUTCHEON.—I object to that as immaterial, irrelevant and incompetent, the selling price of coal has nothing to do with this conspiracy.

Mr. ROCHE.—I don't know whether your Honor desires to have the matter argued or not.

The COURT.—The objection is overruled.

Mr. McCUTCHEON.—We note an exception.

A. What year was that?

Mr. ROCHE.—That was 1909.

A. Either \$8.00 or \$9.00 a ton, I don't remember which.

Q. That is, sold by you? A. Yes.

Q. That is, sold by you to the dealers, do you mean? A. Yes.

* * * * * * * * * *
Mr. ROCHE.—I suppose this entire document may be considered as having been read? We ask that it be marked as an exhibit.

(The document was here marked 'U. S. Exhibit No. 100.')

(The witness here identified the annual statement of the Western Fuel Company for the years 1908, 1910 and 1911, and 1905, and they were marked respectively as 'United States Exhibit 101, 102, 103, and 104.')

No annual statement was prepared for the year 1912. The annual statements were usually prepared in the latter part of January of the year succeeding

(Testimony of D. C. Norcross.)

that for which they were written, and they would be dated back to December [163—109] 31st.)

“Q. Mr. Norcross, drawing your attention for a moment again to some of the entries of overrun appearing upon the statements which were introduced in evidence yesterday afternoon and to which your attention was then directed, it is true, is it not, that upon the records of the company, or rather, upon these monthly statements this excess coal to which you refer, that is, the overrun ex-barges would be recorded as so much coal received?

Mr. McCUTCHEN.—What statements do you refer to now?

Mr. ROCHE.—The statements introduced yesterday?

A. On these coal statements?

Q. Yes. A. Yes.

Q. In other words, upon the books of the company the excess coal would appear as so much coal received by the company? A. Yes.

Q. It is true, is it not, that when that coal was sold, the price which the company received for that coal would be included in the aggregate amount of profits earned by the company? A. Yes.

Q. And that system has been pursued throughout the entire conduct of the business of the Western Fuel Company? A. Yes, it has.”

The boats that brought Nanaimo coal for us to San Francisco were chartered by the Western Fuel Company with the exception of the “Weyfield” which was owned by the company. It was lost, I think, in

(Testimony of D. C. Norcross.)

1905 in the Japanese war.

With reference to the charter of these colliers [164—110] bringing coal from Nanaimo, we sometimes paid so much per ton and sometimes would charter the colliers by the month. There are no flat trip charters. As for our usual course, I would say that we had our monthly charter boats—yearly charters they were—but if we needed extra tonnage we would hire it at so much per ton. And as for the compensation for a boat that we chartered for a year, it would be just a flat sum, so much per month. Where the compensation was paid by tonnage the amount of such compensation was determined by the out-turn or ascertained weight and not by the invoice or bill of lading weight.

During the year 1912 the following coal companies, in addition to the Western Fuel Company, were importers of coal in San Francisco: Hind, Rolph & Co., J. J. Moore & Co., Mitsue & Company and G. W. McNear. Those companies simply purchased coal and brought it into the port here and sold it in cargo. Ordinarily they sold these cargoes to the Western Fuel Company. The Pacific Fuel Company in 1912 was selling imported coal to the dealers. It was the only company in San Francisco selling foreign coal to dealers outside of the Western Fuel Company in 1912 that I can think of. The volume of business done by the Pacific Fuel Company in imported coal is small in comparison with that done by the Western Fuel Company.

I remember that one of our barges sank in the bay

(Testimony of D. C. Norcross.)

but I do not remember whether or not it was the "Melrose." I do not recall the name. I remember that whatever barge it was that sank had coal in it. That was 6 or 8 years ago. [165—111]

(The witness here promised during the noon recess to prepare a list of the stockholders of the Western Fuel Company, together with the number of shares of stock owned by each of them on the 1st of January, 1904, on the 1st of April, 1906, and on the 31st of December, 1913.)

Mr. ROCHE.—"These statements which you produced here a few minutes ago are likewise statements showing the monthly sales of coals of the Western Fuel Company; isn't that correct?

A. They are summaries of the monthly sales.

Q. Summaries of the monthly sales. And they cover both the San Francisco depot sales, as well as the Oakland Depot: Is that correct?

A. Yes, that is correct.

Q. In other words, they show all coals sold by the Western Fuel Company, including, of course, all foreign coals, between the first day of April, 1906, and the 31st day of December, 1912. A. They do.

Q. And, therefore, of course, likewise show all coal sold by the Western Fuel Company in the state of California during that period of time? A. Yes.

Q. Including all foreign coal? A. Yes.

Mr. ROCHE.—We offer these in evidence, may it please the Court. I suppose they might as well be marked as one exhibit. I am going to add to them a few exhibits, two or three statements.

(Testimony of D. C. Norcross.)

(The papers are marked "Government's Exhibit 105.")

Mr. McCUTCHEON.—Do we understand that you propose to offer testimony later on to connect the defendants with these particular statements?

Mr. ROCHE.—These particular statements, of course, are put in for what they are worth; and we intend to indulge, [166—112] if necessary, in any legitimate inference that can be deduced from these statements and what they purport to show. They are introduced at the present time for the purpose of hereafter placing a witness upon the stand to testify to calculations based upon these statements. I understood yesterday that there was no objection urged to any of these documents upon the ground that they were not the best evidence.

Mr. McCUTCHEON.—We are not making that objection now. But we would like to know now whether you offer them as evidence of the formation of a conspiracy, or as evidence of the execution of the conspiracy.

Mr. ROCHE.—In the first place, the question is not a proper question to put to us, because these statements, no objection having been made to them upon the ground that they are not primary evidence, if admitted will naturally demonstrate the quantity of coal sold by the Western Fuel Company, including foreign coal between the first day of April, 1906, and the 31st day of December, 1912. Now, then, we already have in evidence the quantity of coal actually imported by the Western Fuel Company, and, of

(Testimony of D. C. Norcross.)

course, deducting the quantity of coal imported by the Western Fuel Company from the quantity of coal sold by them and on hand December 31, 1912, will likewise demonstrate the quantity of coal for which they cannot account excepting upon the theory that that coal constitutes overage, and for that purpose, among others, these documents are offered.

Mr. McCUTCHEON.—That would not make these statements evidence against these defendants, if the defendants were not informed of the existence of the statements. We object to them upon that ground.

The COURT.—The objection is overruled.
[167—113]

Mr. ROCHE.—Q. I direct your attention to one of these statements, being a summary or abstract of July, 1910, upon which certain writing appears, explanatory of some of the figures. In whose handwriting is that writing in red ink?

A. That is my bookkeeper's, Martin.

Q. Who compiled the statement. Now, upon one of these statements appears 'Stock in Wellington shows apparent overrun of over 800 up to sales reports including August 6.' That overrun would be explained by you, would it not, in the same manner in which you have explained these other accounts, in which you have explained the overrun?

A. I don't know. There might have been a shortage on something else. This is confused with the Australian coal; 600 tons he has transferred to Australian.

Q. That is, there was an average there of 800 tons?

(Testimony of D. C. Norcross.)

A. Offset by a shortage, probably, in another one. Coals get confused.

Q. Isn't it a fact that a part of this tonnage was added to a different kind of coal and a part added to another kind of coal and simply transferred over to the account of the other coal?

A. This is not an overage. It is simply taken from one kind of coal and merely transferred over to another coal. The Wellington showed an overrun of that much. The Australian might have been short that much.

Q. You have not any independent recollection on that subject?

A. No recollection on that subject.

Q. Let me direct your attention to one other statement, the statement for the month of November, 1910, coal statement, Oakland bunker, apparent overrun on Wellington, [168—114] 364 tons 2200 pounds. Transferred to Australian at \$7.88, the price received for Wellington at the bunkers \$2876.06?

A. The same idea. A transfer of one coal to another; no particular overage.

Q. You cannot state, of course, whether there was any shortage or overage in the Australian coal at that time, at all?

A. I cannot tell more than that statement shows right there."

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

(Testimony of D. C. Norcross.)

Q. Now, I direct your attention, Mr. Norcross, to what is entitled "Daily Journal, 1904," and ask you to look at that book and state what that book is.

A. That is Mr. Mills' memorandum book at the dock.

Q. That book was kept by Mr. Mills, the dock superintendent, is that correct, at the dock?

A. Yes.

Q. Will you just look at the book and testify, if you can, in whose handwriting the entries are in the book, or practically all of the entries?

A. As far as I can see, they are practically all Mills'; there is some other handwriting.

Q. That book, for instance, was kept by Mr. Mills, himself, and I suppose the entries were made by him, himself, but occasionally, when he was absent, the entries would be made by some other person; is that it?

A. That is correct.

Q. But the book was kept under his direction and supervision? A. Yes. [169—115]

Q. You, of course, have seen this book before, have you?

A. I have seen it since the investigation began.

Q. Did you ever see it before this investigation was begun? A. I can't remember.

Q. You, of course, can understand the entries kept in this book, can you not? A. No, I can't.

Q. You say that you can't? A. No.

Q. That is, you can't explain these entries?

A. No, I can't do that.

Q. Well, do you mean to say, Mr. Norcross, as

(Testimony of D. C. Norcross.)

secretary of the Western Fuel Company, that you are not familiar with what these items refer to?

A. I am familiar with what they refer to, yes, but as far as explaining this book, though, I can't do it. I never have seen them, and never have any interest in them; I don't know anything about them.

Q. Take this first entry, you are a bookkeeper, are you not, Mr. Norcross, or have you ever been a bookkeeper? A. Yes.

Q. And you are thoroughly familiar with the system of keeping books? A. I think I am.

Q. And have been for years? A. I have.

Q. And in fact, you have supervision and control over the books of the Western Fuel Company, have you not, as secretary? A. Yes.

Q. I direct your attention to the first entry here, appearing, "January 2, 1904," commencing with "Ex-'Comanche' account Oakland bunkers," ending with "over [170—116] 50—735." I will ask you if you don't know that that tower refers to 50 tons 735 pounds? A. That is right.

Q. That is correct? A. Yes.

Q. I would like to have you take that one item, or rather these items appearing under Friday, January 2, 1904, between the first item which appears here, Ex-'Comanche' account Oakland bunkers, over 50 tons 735 pounds" and explain that entry, if you can, to the jury?

A. There are three or four barges in here to begin with.

Q. I understand that.

(Testimony of D. C. Norcross.)

A. Several. Friday, January 2, Ex-“Comanche” account, Oakland bunkers.

Q. Now, what is Ex-“Comanche”? Is it a barge?

A. A barge. “Comanche” is a barge, yes. I am stuck on the start, I cannot explain.

Q. The “Comanche” is a barge owned and controlled by the Western Fuel Company on that date; is that true? A. That is true.

Q. Now what does the next item mean?

Mr. McCUTCHEON.—One moment. This book has not been offered in evidence yet.

Mr. ROCHE.—That, of course, is true.

Mr. McCUTCHEON.—It does not seem proper to ask the witness to explain a record that is not in evidence.

Mr. ROCHE.—This book, as you have already testified, was kept by Mr. Mills, one of the defendants in this case, and your dock superintendent?

A. Yes.

Q. And it was kept by him daily, was it not?

A. I presume so.

Mr. McCUTCHEON.—If the witness knows. Does he know anything further than that is Mills’ handwriting?

A. I don’t know. [171—117]

Mr. ROCHE.—Q. You have already testified that all of the writing, here, was in the handwriting of Mr. Mills?

A. No, I said there was some other writing.

Q. Practically all, that is correct, is it not?

A. Yes.

(Testimony of D. C. Norcross.)

Q. It is substantially all in the handwriting of Mr. Mills? A. Yes.

Q. Do I understand you to say that you don't know that these entries were made on the particular day upon which they appear to have been made?

A. I don't know anything about it.

Mr. ROCHE.—Are you going to object to the introduction in evidence of these books on that ground, Mr. McCutchen?

Mr. McCUTCHEN.—Upon what ground?

Mr. ROCHE.—On the ground that no evidence has been introduced showing that the entries were made at the time that they purport to have been made.

Mr. McCUTCHEN.—I don't know what objection we may make until you offer the books.

Mr. ROCHE.—Q. Do I understand you to say, Mr. Norcross, that the first time you saw these books was after this investigation commenced?

A. To the best of my recollection, it is.

Q. Is it your testimony that before that time you did not know that Mr. Mills was keeping, or was in the habit of keeping any books of this kind?

A. I did not say that.

Q. I am asking you.

A. I presume he kept some.

Q. What knowledge, if any, did you have upon that subject?

A. I got reports from him. What records he copied them from or made them from I know nothing about, I didn't care. [172—118]

Q. Reports were received in your office, were they

(Testimony of D. C. Norcross.)

not, daily, showing the coal received and coal—

Mr. McCUTCHEON.—(Intg.) I object to that as calling for the contents of a written instrument, if it was a written report.

Mr. ROCHE.—Q. Did you receive any reports daily showing coal imported or coal discharged from the boats and received by the Western Fuel Company and likewise coal sold?

A. We did.

Mr. McCUTCHEON.—Do you mean a written report?

Mr. ROCHE.—I mean a written report.

Mr. McCUTCHEON.—I object to that as calling for the contents of a written instrument.

The COURT.—The objection is overruled.

A. We did.

Mr. ROCHE.—Q. From whom did you receive those reports?

A. Some from Mills and some from Mr. Mayer and some from others.

Q. Mr. Mills, from whom you received some of these reports, was your dock superintendent, and is the Mr. Mills in whose handwriting most of these entries appear; is that correct?

A. That is correct.

Q. Did you ever make any investigation prior to the date upon which the Grand Jury took up this particular matter, to ascertain what record was kept or were being kept by Mr. Mills upon the dock?

A. No.

Q. Did you ever see any of those reports? Did

(Testimony of D. C. Norcross.)

you ever see this book in particular prior to sometime during the year 1912?

A. I might have seen it, I don't recall it.

Q. That is, you have no recollection upon the subject [173—119] at all?

A. No. I don't remember having looked at the books for any purpose.

Q. Do you know of your own knowledge that these records do show the coal discharged from the coal-bunkers, among other things, the coal discharged from the offshore bunkers onto barges owned and controlled by the Western Fuel Company, and subsequently discharged from the barges?

Mr. McCUTCHEON.—I submit that the witness has already said that he had never seen the records, and didn't know anything about them; didn't know they were being kept.

The COURT.—Answer the question.

A. No, I don't know of my own knowledge.

Mr. ROCHE.—Q. Did you ever have any talk or conversation with the defendant, Mills, regarding the entries contained in this book at any time?

A. I think I have since the investigation begun.

Q. When did you have such a conversation with the defendant, Mills?

A. Any time within the last ten months.

Q. Did you have any conversation with him relating to the contents of this diary and what these items purported to be?

A. I don't know whether I spoke to him about that particular book or any particular book. I

(Testimony of D. C. Norcross.)

asked him some questions about why he made these entries.

Q. Did you ask the defendant, Mills, by whom the entries in all of these diaries, one of which I have already directed your attention to, and the others of which are now in front of me, and relating to each year since 1904 to and including 1912, were made?

[174—120] A. I don't think I did.

Q. Did you ask him to explain any entries appearing in any one of those books? A. No.

Q. Did you ask him at any time the purpose for which the entries were made, or any of these entries?

A. I asked him why he made them.

Q. What, if anything, did he say?

A. So he could get the deliveries of the coal out of his barges.

Q. Was that the only explanation which he made?

A. Well, I don't remember him saying much more than that.

Q. Did he also tell you that the entries disclosed the amount of coal delivered from the offshore bunker to the barge? A. No.

Q. Or from the barge to any of the boats which were coaled with coal previously laden upon the barge?

A. No, I was not talking about that with him.

Q. Did he tell you that the statements forwarded by him to your office from time to time, showing coal discharged into the barges, and subsequently laden from the barges onto boats supplied with coal

(Testimony of D. C. Norcross.)

for fuel purposes were based upon the figures and calculations contained in this book and other books similar in kind kept by him?

A. He made no statement of that kind to me, no.

Mr. McCUTCHEN.—If you propose to show, if you state that you intend to show that any of these defendants other than Mr. Mills ever saw these books, or heard of them during any of the time covered by your indictment, we will make no objection to your preliminary offer of them. [175—121]

Mr. ROCHE.—Counsel certainly understands that we desire to put these books in evidence as books of original entry for the purpose of showing the weight of the coal as it was discharged from the offshore bunker, and the weight of the coal as determined by the Western Fuel Company at the time it was laden from the barges to the boats which were coaled with coal previously laden upon the barge; that is the purpose for which we intend to use this book and those books. Of course, we will simply have to withdraw this witness and put another witness on to prove the entries before we can put the book in evidence.

Q. As secretary of the Western Fuel Company, Mr. Norcross, of course you have complete supervision and control of all the records and books of the company? A. Yes.

Q. And these books were brought out here by you in pursuance of a subpoena served upon you?

A. Yes.

Q. How long has this book in particular and the

(Testimony of D. C. Norcross.)

other diaries similar in kind, covering the years from 1904 to and including 1912, been in your possession?

A. They have not been in my possession at all, except to take them from Mr. Mills' office to the Grand Jury room.

Q. Mr. Mills' office is located upon the Western Fuel docks at the Folsom Street dock? A. Yes.

Q. And these books were kept day by day in that office, is that correct?

Mr. McCUTCHEON.—The witness says he does not know.

Mr. ROCHE.—Q. When you first saw these books, did you find them in your office?

A. In Mr. Mills' office.

Q. Mr. Mills' office? A. Yes.

Q. These records, then, are brought from Mr. Mills, who ever since 1903 has been the dock superintendent of the [176—122] Western Fuel Company? A. Yes, sir.

Q. And has had general supervision and control over the barges and the docks of the company, is that correct? A. That is correct.

Q. And the actual discharge from the offshore bunkers and from boats into barges, and thereafter from barges into other vessels? A. Yes.

Q. And sold by the Western Fuel Company to the owners of these other vessels; is that correct?

A. Yes.

The COURT.—We will take a recess, now, until two o'clock.

(Testimony of D. C. Norcross.)

AFTERNOON SESSION.

Mr. McCUTCHEN.—If your Honor please, with reference to the books which were called to the attention of the witness Norcross just before adjournment, and in order to facilitate the prosecution in laying the foundation for an offer of these books, we will admit that the entries in these books in the handwriting of the defendant Mills were made by him in the course of his employment with the Western Fuel Company.

Mr. ROCHE.—And that they were made upon the dates which they bear?

Mr. McCUTCHEN.—Yes, we will assume that to be true; yes, we will make that admission subject to correction.

Mr. ROCHE.—And will you also admit, Mr. McCutchen, that where the handwriting is not—

Mr. McCUTCHEN.—Pardon me for interrupting you, I think I understand what you have in mind. Subject to correction hereafter, we will admit that where entries are made in the [177—123] handwriting of any other person than Mr. Mills those entries were made by the person making them in the course of his employment with the Western Fuel Company.

Mr. ROCHE.—And upon the dates upon which they purport to have been made.

Mr. McCUTCHEN.—We don't know anything about that but we make that admission subject to correction.

Mr. ROCHE.—Then we offer in evidence at this

(Testimony of D. C. Norcross.)

time, may it please the Court, the diaries kept by the defendant Mills, the dock diaries kept by the defendant Mills, for the years 1905, 1906, 1907, 1908, 1909, 1910, 1911 and 1912.

Mr. McCUTCHEON.—Now, for the purpose of preserving a record—

Mr. ROCHE.—Just a minute, Mr. McCutchen; and also for the year 1904.

Mr. McCUTCHEON.—We object to these books upon the ground that the books and the entries in them as to all of the defendants, except possibly the defendant Mills, are hearsay and are not admissible, and that they are incompetent.

The COURT.—That may or may not be true at the present time. The objection, however, will be overruled and the books will be admitted.

Mr. McCUTCHEON.—We take an exception to that ruling. And now we make the same objection on behalf of all the defendants excepting the defendant Mills.

The COURT.—All the effect that this matter might have upon the other defendants will depend a great deal on whether or not a conspiracy is shown.

Mr. McCUTCHEON.—Yes.

Mr. ROCHE.—Of course, that is correct, may it please [178—124] the Court, that if we do not show a conspiracy among these defendants, that as to such defendant against whom we do not show a conspiracy the Government would not have made out a case. But the primary purpose for which the books are being offered at this time is for the pur-

(Testimony of D. C. Norcross.)

pose of showing the weight of the coal at the time the coal was laden on the barge, and likewise to show the weight of the coal at the time the coal was taken from the barge and laden on to the boats.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—And your Honor overrules the second objection also?

The COURT.—Yes.

Mr. McCUTCHEN.—We take an exception.

(The books were here marked "U. S. Exhibits 106 to 114, inclusive respectively.")

(Stipulated by counsel for the defendants with reference to the entries in the dock diaries or journals kept by the defendant Mills "United States Exhibits 106 to 114" that the word "Ex" in front of the name of a barge means coal that came out of the offshore bunkers generally into the barge; and that the word "Ex" in connection with a steamer and generally appearing just in front of the name of the steamer as distinguished from the name of a barge, means coal coming out of such steamer. In other words, that "Ex" in front of the name of a barge means "into" and in front of the name of a steamer "out of.")

(The attention of the witness is here directed to the first item contained in the dock diary or journal for 1904 and appearing under the date—Friday, January 2d.) [179—125]

"Mr. ROCHE.—Q. As a bookkeeper, Mr. Norcross, and it being admitted that the word "ex" in front of the word 'Comanche' means 'into' instead

(Testimony of D. C. Norcross.)

of taken out of, can you read that first item?

A. January, Friday 2d ex 'Comanche', acc. Oakland bunkers: Wallsend 751 tons; Anthracite screenings, 100 tons, 280 lbs. Total 851—280.

Ex-'Corsair': New 'Wellington', acc. 'Titania'; Voyage 125—let me ask you right here, what does that item?

A. I presume it means there 'ex Titania' into the 'Corsair' instead of 'Ex Corsair' acc. of Titania.'

Q. That is, the coal was taken out of the 'Titania' and put upon the barge?

A. That is what I presume he means. 'Acc. Titania, Voyage 125, 625 tons, 1084 lbs. Steamer Siberia, 815 tons, 1130 tons (lbs.) Track, 9 tons, 500. Total 824 tons, 1630 lbs. Balance, 26 tons, 890 lbs. That is under 'Comanche.' Under 'Corsair' it says: 'Ex Ludlow, New Wellington, acc. Titania; Voyage 125, 425 tons, 1444 lbs. Ex Naumania, Stanford Anthracite screenings—there is a word here that I cannot make out, maybe you can read it.'

Q. No, I can't read it. Just read the rest of it.

A. 'Acc. Oakland bunkers'; then there is another word I can't make out, I think the word is 'special'; '162 tons, 630 lbs. Acc. William Tillie, 751 tons, 60 lbs. Acc. Pac. C. Co. 810, 890 lbs. Total, 1723 tons, 1580 lbs. 'Sierra', 842 tons, 305 lbs. 'Buford' 931 tons, 2010 lbs. Total 1774 tons, 75 lbs. Over, 50 tons, 735 lbs.'

Q. To what does 'over' refer?

A. To the quantity of coal delivered in excess of

(Testimony of D. C. Norcross.)

the amount he charged his barge with.

Q. To what particular barge does that item relate? [180—126] A. To the barge 'Nanaimo.'

Q. In other words, it means, does it not, 'Mr. Norcross, that 50 tons, 735 lbs, of coal were taken off the barge 'Nanaimo' in excess of the amount of coal that the books and records of the company show went into the barge?

Mr. STANLEY MOORE.—Well, I don't think it should be characterized as the books and records of the company.

Mr. ROCHE.—Very well, I will withdraw that question and put it in this way: Q. This record upon its face shows, does it not, the amount of coal that went into the barge? A. It is supposed to.

Q. It also shows what was done with the coal which thus went into that barge?

A. The coal that came out of the barge.

Q. The coal that came out of the barge; is not that correct? A. That is right.

Q. And this record shows upon its face that 50 tons, 735 lbs. more of coal came out of the barge than was put on to the barge?

A. More than he charged his barge with.

Q. Assuming these records to be correct, there apparently were 50 tons, and 735 lbs. more coal came off the barge than went onto it? A. Yes.

Q. You say you have glanced over these records?

A. Yes, very casually.

Q. The same explanation would really apply to practically all of these records, with the exception

(Testimony of D. C. Norcross.)

of the name of the barge, or the name of the ship, where there is an overage, as you have just given.

A. Practically the same.

Q. That is correct, is it not, Mr. Norcross?

A. Yes, unless there was a shortage in some of them. [181—127]

Q. Well, there are very few shortages in these books; that is true, is it not? A. There are some.

Q. Well, a fraction of one per cent?

A. I would not go that low; you have figured it down finer than I have. I notice upon the face of nearly all of these items, Mr. Norcross, is a large 'E' in red ink; what does that mean? A. I don't know.

Q. Does not that mean that that has been entered, and a record of those entries sent to the office?

A. I presume so; I presume it means that he has reported, that he has made his report for the barge.

Q. And that as soon as the report was made it would be checked off with the letter 'E'; is not that correct?

A. I presume that is his way of doing it to show that he has reported.

Q. And the office to which he reported was the office of the Western Fuel Company in which you were located as secretary. A. Yes.

Q. I direct your attention to some numbers appearing in red ink; let me see if there is one on that first entry; well, take the entry appearing on January 5th. The word 'E' appears with reference to

(Testimony of D. C. Norcross.)

these entries and also various numbers, 116, 119, in red ink; to what do those numbers relate, if you know?

A. Yes, sir, I believe they are presumed to be the reports he makes of his deliveries to different steamers; whenever he makes a delivery out of barges he sends a tag showing so much coal delivered ex-barge to the steamer, or wherever it may go.

Q. When coal is laden on a barge, either from a bunker or from any other source, is there any report sent to [182—128] the office of such quantity of coal?

A. Yes, it is included in the discharge report out of steamers, when we are showing a steamer discharged.

Q. That is, the quantity of coal laden into a barge is shown in connection with the reports sent to the office, showing the discharge of coal into boats, is that correct? A. Out of the boats?

Q. Out of the boats? A. Yes.

Q. That is, you mean the boats in which the coal is imported into this port? A. Yes.

Q. And then when the coal is taken out of the barge a report is also sent to the office showing the exact quantity of coal taken out of the barge?

A. Yes.

Q. And those reports are sent to the office of the company in which you are located as secretary?

A. Yes.

Q. To whom are those reports given?

(Testimony of D. C. Norcross.)

A. They may be on file in the manager's office.

Q. And who is the manager? A. Mr. Smith.

Q. The defendant, James B. Smith; is that correct? A. Yes.

Q. How frequently do those reports come to your office? A. Daily, I think.

Q. Are they turned over to Mr. Smith daily?

A. They are put on file in his room.

Q. What happens to them after they are put there on the file for some time?

A. Well, I presume they are looked at.

Q. Looked at by whom?

A. The bookkeeper uses them; Mr. Smith looks at them.

Q. Who looks at them? A. Mr. Smith.

Q. You mean James B. Smith.

A. Yes. [183—129]

Q. This procedure to which you have just referred showing the coal laden upon the barge and also showing the coal taken off the barge has been sent to the office of the Western Fuel Company as indicated by you since the 1st day of January, 1904; is that correct? A. Yes.

Q. That has been the system pursued by Mr. Mills, by the defendant Mills?

A. I think they have, right along.

Q. And the system of placing these reports in the office of the defendant James B. Smith has likewise been rigorously adhered to; is not that correct?

A. I believe so, yes.

Q. Have you any personal knowledge, Mr. Nor-

(Testimony of D. C. Norcross.)

cross, as to when these overages are computed, either overages or underages—shortages?

A. Computed where?

Q. At what particular time; that is, as to whether they are computed at the time there is a cleanup at the barge. A. I understand that is the way.

Q. What do you understand by the words 'cleanup of a barge'?

A. I mean whenever he has taken out the quantity that is in there; if he ever exceeds the amount he is debited with it is called a cleanup, as I understand it.

Q. At the time of a cleanup is all the coal taken out of a barge?

A. If I am talking from personal knowledge, Mr. Roche, I cannot tell you.

Q. Then I won't press that question if you don't know."

I knew of the existence of these overages in all the years between 1904 and 1913, and I learned of such overages at the time when they appeared. I first discussed overages with the defendant Howard in 1904, considering then the overage of the [184—130] year 1903. We treated overages in our discussion as overages in general, without reference to those in any particular place. It was just an overage on our total coal stock. I am not sure that I thus discussed overages with Mr. Howard every year. I suppose I talked with him about them four or five times. However, I undoubtedly considered overages with him in connection with the preparation of financial statements for presentation to the directors.

(Testimony of D. C. Norcross.)

If I found on taking an inventory that we had an excess of coal on hand, I would as a rule mention it to Mr. James B. Smith as well as to Mr. Howard. I suppose I discussed the subject of overages with Mr. Smith as often in general as I did with Mr. Howard, and probably at the same time. We treated the overages as general and relating to all departments. We did not segregate the overages. I may have had one conversation in 1908 or 1909 with the defendant Bruce upon the subject of overages, but I do not remember about it clearly. I cannot recall ever discussing overages with defendant, Sidney V. Smith. I do not think I ever had any conversation on the subject with the defendant Mills, and I never did with the defendant Edward J. Smith. I do not recall having any conversations with defendant Schmitt regarding overages before this investigation started.

The subject of overages was discussed by all the directors before this investigation started. A number of these discussions took place early in February when the investigation started. I never discussed overages with the defendant Mills or the defendant Mayer since this investigation started.

(Admitted by counsel for the defendants, subject to correction, that all the steamers hereinbefore mentioned by the witness Dickson as operated by the Pacific Mail Steamship [185—131] Company except the "Nile" and "Persia" are registered under the American laws.

"Mr. ROCHE.—Will you admit, Mr. McCutchen,

(Testimony of D. C. Norcross.)

that the records which I have in my hand now were produced here from the United States Customs House, and are the record entries showing the entry of the various boats indicated in the record upon which the Western Fuel Company imported some of these foreign coals into the port of San Francisco from Nanaimo and from other places indicated in these documents?

Mr. McCUTCHEON.—If you will state that as the fact we will make the admission, subject to correction.

Mr. ROCHE.—All right.

* * * * *

Mr. SULLIVAN.—We will send you a copy of it this afternoon.

Mr. ROCHE.—I will read to the jury the first one here, the complete document, so that the jury can understand the situation.

* * * * *

The first record, Mr. McCutchen, relates to the steamship 'Reidar,' bringing coal from Ladysmith and from Nanaimo to San Francisco. The first part of this document is an invoice from Ladysmith, dated March 24, 1906, invoice of coal consigned to the Western Fuel Company at San Francisco, for sale on account of, shipped by Wellington Colliery Company, limited, per steamer 'Reidar,' marks and numbers, 2115 tons coal, value \$4.00, amount \$8460; consular certificate \$2.50, total \$8462.50. In red ink, over the value of the coal, is written 'Bituminous, 415.' Then appears, '67 cents per ton,' indicating

(Testimony of D. C. Norcross.)

the duty to be paid per ton. In red ink, upon the face of this invoice appears 'April 10, 1906, merchandise as noted, amount \$8460. C. J. E. John T. Dare, Appr.' [186—132]

Date of entry March 29, 1906. No. of entry, 4369. I certify that this invoice was presented to me on entry San Francisco, March 29, 1906, G. P. Clough, Deputy Collector. U. S. Appraiser will examine at wharf before delivery.

On the back of that appears the following: 'Consular certificate. I, the undersigned, Consular Agent of the United States of America, do hereby certify that on this blank day of March 24, 1906, A. D. 189—, the invoice described in the indorsement hereof was produced to me by the signer of the annexed declaration. I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation is correct and true, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.'

Witness my hand and seal of office the day and year aforesaid. Henry G. Seaborn, Consular Agent of the United States of America.'

'Declaration of owner or his duly authorized agent covering goods shipped without sale.

I, the undersigned, do solemnly and truly declare that I am the agent of the merchandise in the within

(Testimony of D. C. Norcross.)

invoice mentioned and described; that the said invoice is in all respects correct, and was made at Ladysmith, whence said merchandise is to be exported to the United States of America; that said invoice contains the actual market value or wholesale price of the said merchandise at the date hereof in the principal markets of B. C.; that said actual market value is the price at which the merchandise [187—133] described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which I would have received and was willing to receive for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, and that it includes all charges thereon and the actual quantity thereof, and that no *different* invoice of the merchandise mentioned in the said invoice has been or will be furnished to anyone. I further declare that it is intended to make entry of said merchandise at the port of San Francisco, in the United States of America. Dated at Ladysmith, this March 24, 1906.
F. W. Hawes, Agent' And endorsed: 'Not purchased by importer. Invoice No. 88, issued in *TriPLICATE*
QuadriPLICATE.

American Consular Service at Chemainus, B. C.
Date, Mar. 24, 1906; Consignor, Wellington Colliery Co., Ltd., Victoria, B. C. Consignee, Western Fuel Co., San Francisco.

Name of Vessel, 'S. S. Reidar'; port of shipment, Ladysmith; Port of arrival, San Francisco; Port of entry, San Francisco; Value, \$8462.50. Contents, Coal.'

(Testimony of D. C. Norcross.)

And another endorsement as follows: 'Custom-House indorsement, No. 4369. Importer, Western Fuel Company; Vessel, Reidar; From, Ladysmith; Arrived, Mar. 28, 1906. Kind of entry Deposit. Marks, quality and contents: 2115 tons Coal. March 29, 1906, P. M. Liquidated, April 12, 1906.'

Instead of reading the contents of the other invoice, Mr. McCutchen, I will simply refer to it.

This is the second invoice relating to that part of the cargo which was shipped from Nanaimo. The invoice is dated March 22, 1906. Invoice of coal to the Western Fuel Company at San Francisco, California; account of Western Fuel Company; [188—134] shipped by Western Fuel Company; account of Western Fuel Company; shipped by Western Fuel Company, Nanaimo, B. C., per Steamer 'Reidar.' The tonnage is 3686 tons of coal, at \$4.00, value \$14,744; consular invoice, \$2.50, making a total of \$14,746.50, upon which the tariff rate was 67 cents per ton. On the back of this invoice appears the Consular Certificate, the same in form as the Consular Certificate already read in evidence, and then a declaration of the owner, which is signed by the Western Fuel Company by D. M. McKay, Agent.

The other indorsements appearing on this invoice are substantially the same as were upon the invoice previously read excepting applying to this particular consignment of coal."

(Admitted by counsel for defendants that D. M. McKay was at the time the resident agent of the Western Fuel Company at Nanaimo, and, subject to

(Testimony of D. C. Norcross.)

correction, that in each of these invoices where they appear to have been signed before the Consular Agent by an individual who assumes to act for and (designates himself) as the agent of the Western Fuel Company, that he was, in fact, at the time the resident agent of said company.

“Mr. ROCHE.—Attached to this entry are two bills of lading, one from each one of these ports.

‘Voyage No. ——.

Wellington Colliery Company, Limited; Wellington Coal; No. 4369. Ladysmith, B. C. March 24, 1906; shipped in good order by Wellington Colliery Company, Limited, on board the ‘S. S. Reidar,’ whereof C. Stangebye is Master and bound for San Francisco twenty one hundred & fifteen (2115) tons Wellington Lump coal, the dangers of fire and navigation excepted, consigned to Western Fuel Co. of San Francisco, Cal. [189—135] Cour. Stangebye, Master.’

The bill of lading from Nanaimo reads as follows:

‘No. 148. New Wellington Coal, 3686 tons. Total, 3686 tons. Shipped in good order and condition by the Western Fuel Company, on board the steamer called the ‘Reidar’ whereof Stangebye is Master, now lying at the port of Nanaimo, Vancouver Island and bound for San Francisco, Cal. Three thousand six hundred and eighty-six tons New Wellington Coal, being marked and numbered as in the margin are to be delivered in like order and condition at the Port of San Francisco, Cal., the dangers of the sea only excepted, unto Western Fuel Co., or to their

(Testimony of D. C. Norcross.)

assigns, they paying freight for said coal.

In witness whereof the Master or Purser of said vessel hath affirmed to Four Bills of Lading all of this tenor and date; one of which being accomplished, the others to stand void. Dated at Nanaimo, V. 1 the 22nd day of March, 1906. Ceaur Stangebye, Master.'

The next document I am reading into the records is the Consumption Entry to which the two bills of lading is attached.

'Consumption Entry. P. W. Bellingall, Custom-House Broker. Entry of Merchandise imported by Western Fuel Company in the Nor. Str. 'Reidar,' whereof Stangebye is Master, from Ladysmith, on March 28, 1906, San Francisco, March 29, 1906.

Invoice dated at Ladysmith, 2115 tons coal, 2115, \$8460. 3686 tons coal, 3686, \$14,744; Total, \$23,204. Total number tons of coal, 5801.'

The value is again repeated in another column.
[190—136]

Mr. McCUTCHEON.—Mr. Roche, if you will simply state the substance of that, we will not make any objection.

Mr. ROCHE.—All right. The tonnage in another column here has been stricken out and in red ink are the figures 5811. I suppose that means the liquidated weight. Then underneath that appears, \$23,204, 5811 tons, 67 cents, \$3893.37. And then a

(Testimony of D. C. Norcross.)

stamp down in the corner reading as follows:

"Deposit \$3886.67

Duty" in red ink

"\$3893.37."

and then underneath that in red ink: "U. S. 6.70. Western Fuel Company, Geo. H. Probasco, Atty.-in-Fact."

Mr. McCUTCHEON.—Now, in that connection, Mr. Roche, will it be admitted that \$3,893.37 was paid to the Government when the ship arrived here and was entered for discharge?

Mr. ROCHE.—Yes, that was the deposit paid.

Mr. McCUTCHEON.—And that was paid on the assumption that the bill of lading weights were correct?

Mr. ROCHE.—Yes. There was a shortage there, there was 6.70 returned.

Attached to the Consumption Entry is the following:

"United States Customs Service. Manifest No. 4369. Return of coal measured and weighed from on board the 'Reidar' whereof blank is Master, from 'Ladysmith.' I suppose you will admit, Mr. McCutchen that Ladysmith was the last port from which she cleared?

Mr. McCUTCHEON.—Yes.

Mr. ROCHE.—'To whom consigned as permitted, Western Fuel Co. 2115; 3686; total, 5801 tons coal. Excess 10 tons, 210 lbs.'

You will admit, Mr. McCutchen, that that means that [191—137] there were taken off the ship 10

(Testimony of D. C. Norcross.)

tons and 210 lbs. of coal in excess of the amount indicated on the invoices and the bills of lading.

Mr. McCUTCHEN.—Yes; that is, when the ship was weigher here it was found that she had more coal in her than was indicated by the bills of lading; and that then, in addition to the other amount, the Government was paid \$6.70.

Mr. ROCHE.—That is correct. And at the bottom of this document it says: ‘Port of San Francisco, April 9, 1906, F. L. Wooster, Weigher.’

In some of these cases I understand, Mr. McCutchen, that an entry was made by a person who assumed, and apparently was, or at least assumed to be an agent of the Western Fuel Company. Will you admit that in each instance that the person by whom the entry was made, and who represented himself as the Agent of the Western Fuel Company was in fact that Agent and had authority to appear and make the entry on behalf of the Western Fuel Company?

Mr. McCUTCHEN.—Subject to correction we will make that admission.

Mr. ROCHE.—All right. I think we will have each year marked as a separate exhibit.

(Thereupon the documents were marked as follows:—)

For the year 1906, ‘U. S. Exhibit 115’;

For the year 1907, ‘U. S. Exhibit 116’;

For the year 1908, ‘U. S. Exhibit 117’;

For the year 1909, ‘U. S. Exhibit 118’;

(Testimony of D. C. Norcross.)

For the year 1910, 'U. S. Exhibit 119';

For the year 1911, 'U. S. Exhibit 120';

For the year 1912, 'U. S. Exhibit 121.' "

[192—138]

* * * * *

Mr. ROCHE.—Now, I have here the claims interposed against the Government by the owners of the boats which were coaled with coal imported by the Western Fuel Company and upon which it was claimed duty had been paid the United States Government by the Western Fuel Company. We desire to offer all of these claims in evidence for the year 1905.

Mr. STANLEY MOORE.—No objection, and so far as the signatures are concerned, so far as any officers of this company are concerned, it will be admitted that they are their genuine signatures.

Mr. ROCHE.—All right. The signatures of the officers are not upon these claims because the affidavit where a drawback is claimed is attached to the original entry, and they are already in evidence here.

Mr. STANLEY MOORE.—Oh, I didn't know that. The Pacific Mail Steamship Company, or any other steamship company interposed the claim because the money is payable to it, and I supposed it was on those affidavits as well.

Mr. ROCHE.—The affidavit upon which the duties are rebated or repaid to the claimant is the affidavit made by an official or a representative of the Western Fuel Company indicating in what boat the coal was imported into the United States and further as-

(Testimony of D. C. Norcross.)

serting that duty has been paid upon that coal.

Mr. KNIGHT.—Mr. ROCHE, those are produced from the custom-house, are they not?

Mr. ROCHE.—Certainly; these are original records."

* * * * *

[193—139]

"Mr. ROCHE.—We will offer all of these claims as one exhibit.

Mr. STANLEY MOORE.—There is no objection. They may be considered as having been read.

Mr. STANLEY MOORE.—Yes, they may be considered as having been read.

Mr. ROCHE.—I just want to read to the jury one of the draw-back affidavits. You will admit, will you not, Mr. McCutchen—I think it is already covered by your former admission—that where the affidavit upon which the drawback is based and upon which the custom duty is refunded is made by a person who purports to represent the Western Fuel Company or by an agent of the Western Fuel Company, that he was in fact such agent and that he had authority to represent the Western Fuel Company?

Mr. STANLEY MOORE.—Certainly, we will make that admission.

Mr. ROCHE.—I desire to read to the jury just one of the drawback entries or claims. This is a claim, gentlemen, made by the Pacific Mail Steamship Company for the return to it of duty claimed to have been paid by the Western Fuel Company upon coal consigned to the Western Fuel Company and subsequently claimed to have been delivered upon the

(Testimony of D. C. Norcross.)

steamship "China" for fuel purposes.

"Pacific Mail Steamship Company. Certificate of delivery of imported merchandise. Port of San Francisco, Description of merchandise, Coal; By whom imported, Western Fuel Co.; Now imported, Nor. Str. 'Terje Viking.' When imported, July 5, 1906; Where imported, San Francisco; Whence imported, Ladysmith; Quantity, 3695 tons; value, \$14,780; Rate of duty paid, 67 cents; No. Entry, 8409.

[194—140]

I, James B. Smith, Vice-President and a stockholder of the Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Co., and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this August 6, 1906. George H. Probasco, Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 11, 1909."

Also there is another certificate which was signed by John L. Howard, reading as follows: it describes Bituminous Coal imported by the Western Fuel Company by the Norwegian steamer "Terje Viking" on July 5, 1906, at San Francisco, imported from Nanaimo, 285 tons, and the rate of duty the same

(Testimony of D. C. Norcross.)

as before, 67 cents; and then the following affidavit:

"I, John L. Howard, President and a stockholder of the Western Fuel Company do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or reduction for damage or other cause, except as herein set forth, and that the said merchandise has been delivered to Roth, Blum & Co., and that no other certificate of delivery covering the above merchandise has been issued by me. John L. Howard, President, Importer. Sworn to before me this 21st day of August, 1906, George H. Probasco, Notary Public in and for the City and County of San Francisco, State of [195—141] California; Commission expires April 11, 1909."

And there is also a certificate that 5743 tons were consigned to the Western Fuel Company at San Francisco, on the Steamship "Terje Viking" from Ladysmith, British Columbia, June 30, 1906. And the next document is the United States Customs Service blank, Manifest No. 8409; return of coal measured and weighed from on board the "Terje Viking," from Ladysmith, consigned to the Western Fuel Company, showing a shortage of 139 tons, 1310 lbs.

And then the other part of the document is the paper that is called Consumption Entry, and that is in form similar to the one I read to you a little while ago.

And then next is the claim itself, and I will read that to you in full:

(Testimony of D. C. Norcross.)

"Pacific Mail Steamship Company. Entry of Coal for use on board Steam Vessels. Entry of coal intended to be shipped under official supervision by the Pacific Mail Steamship Company, and to be used for fuel on board the Am. Str. "China," D. E. Frick, Master, a vessel propelled by steam, duly registered under the laws of the United States, and engaged in Foreign Trade, now in port.

Quantity.	Date of Information	Importing or Transporting Vessel.	Amount of Duty.
2000 tons	July 5-06	Nor. Str. Teye	\$930 63
1389		Viken	—
			100

Entry No. 8409

C. L. B.

Vessel Cleared —— for Hong Kong.

PACIFIC MAIL STEAMSHIP CO.

By J. S. MATTOCK, H.,

Attorney in Fact.

I do solemnly, sincerely and truly declare that the coal described in the within entry, and now at vessel is intended to be used for fuel on board the above-described vessel and not to be re-landed at any place or port within the United States, [196—142] and that all of said coal was duly imported and that the duties thereon were paid at the port of San Francisco on or about 5 day of July, 1906. J. S. Mattock, Port of San Francisco. Declared before me, this 9 day of July, 1906. T. J. Barry, A deputy collector.

Port of San Francisco, July 9, 1906. To the Surveyor of the Port: You will direct an inspector to superintend the transfer and lading of the coal de-

(Testimony of D. C. Norcross.)

scribed in the accompanying entry on board the steamer Am. Str. China and when such lading is completed to make due return to that effect. T. J. Barry, A Deputy Collector. P. W. Smith, Deputy Naval Officer.

Port of San Francisco, July 9, 1906. I have superintended the transfer and lading of the within described coal on board the Am. Str. China. John A. Ross, Inspector, F. L. Wooster, Weigher. Weight 1389. 267-2240 Tons Coal D. Vessel Cleared July 14-06. Cui July 25-06. A. J. P. E. A. W.

[Endorsed]: "Pacific Mail Steamship Co. 1906-1907. Debenture No. 16. Claimant Export Vessel Am. Str. China For Hong Kong. Date of Clearance July 14, 1906. Drawback \$930.63. No. To the District Inspector Chauncey M. St. John. July 9, 1906, 1:30 P. M. Mattoon & Company, Custom House Brokers, San Francisco."

(Admitted by the prosecution that the word "Inspector" means an inspector employed by the Treasury Department. Admitted also by the prosecution that a customs weigher also [197-143] signs the above document, but explained that he was not the person who discharged the coal; in other words, that the chief customs weigher who was supposed to be present at the time the coal was actually weighed when it was discharged from the barge into the boat has not signed this entry. Admitted also by counsel for defendants that each one of these entries refers

(Testimony of D. C. Norcross.)

to coal which was claimed by the Western Fuel Company to have been loaded upon boats belonging to the Pacific Mail Steamship Company.

Cross-examination by Mr. STANLEY MOORE.

* * * * *

There is a sign of no admittance down at the Folsom Street bunkers. The purpose is to keep people off the superstructure. It is customary on many of these wharves around the city to have such signs.

The bunkers are open on top so that you can drop coal down into them from the cars. The cars run along the track to the place where you want to dump and you throw the sides open and let the coal run through into the bunkers. Imported coal is weighed upon a rising or up-beam. All coal imported by the Western Fuel Company comes in large consignments, 2,000 to 8,000 tons in a vessel. It is sold out, however, for the most part in 5 ton loads. Most of the coal sold by the Western Fuel Company is delivered over its wagon scale from the yard and bunkers. The greater percentage of coal coming here to the Western Fuel Company is thus sold in wagon-load lots. The coal thus sold is very carefully weighed on what you would call an even beam.

With reference to the coal that is sold to vessels [198—144] being delivered from barges to such vessels, the weighing is by tubs, whereas in unloading imported coal from the ships on the wharf the weighing is by cars. On the barges they average their weight by tubs. They are supposed to weigh

(Testimony of D. C. Norcross.)

one out of fifteen tubs, and to average the next fourteen on the weight of the first.

When I say that I regarded these barges as storage hulks—I mean that the barges in our eyes are simply yards—a place to put coal. If it should be more convenient to put coal into the barge for delivery to the steamers later on, we would put it there instead of storing it in the yard. The barges are regarded as constituting part and parcel of the company's premises, just as the bunker or the yard would be.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

"Mr. STANLEY MOORE.—Q. Mr. Norcross, when was the first time that you ever heard anything about overages or overruns in the coal business?

A. In 1903, the latter part of 1903.

Q. In what connection did you hear about it at that time?

A. In connection with the coal that had been purchased from the Wilson Company and the Howard Company, which was subject to adjustment of payments on final out-turn of the coal.

Q. The Wilson Company was a company that had been in the coal business here for several years prior to that time? A. Yes.

Q. Do you recall whether at the time that you purchased their coal they had a considerable stock on hand? [199—145]

Mr. ROCHE.—One moment, may it please the Court. That is objected to upon the ground it is not

(Testimony of D. C. Norcross.)

proper cross-examination, and as immaterial.

Mr. MOORE.—The purpose of it was this,—he was asked, Mr. Norcross was, when he first heard about overruns. Now, I propose to show upon cross-examination, if I might be permitted to do so, that the first overrun that he heard about was not in connection with the business of the Western Fuel Company at all, but at the time they purchased certain coal, buying it upon book weights subject to adjustment on out-turn weights; when it was actually weighed, it came to his knowledge in that case. It is merely cross-examination as to when he first heard about overruns. I think that it is admissible upon cross-examination on this theory too, your Honor. It seems to me that this witness has been examined as if these overruns were a strange and novel thing and peculiar only to the business transacted by the Western Fuel Company and that some veil of secrecy seems to surround them, that as little was said concerning them as possible, as if they were treated as something strange and unusual; and it is to negative that idea or inference, if it is one which is claimed can be drawn legitimately from the direct examination, I would like to ask of this witness if he did not hear of overruns in connection with the business of other companies as well.

Mr. ROCHE.—The direct examination of this witness in so far as it relates to overruns related exclusively to the business done by the Western Fuel Company. We are not at this time trying any frauds committed by any other coal concern or companies in

(Testimony of D. C. Norcross.)

the State of California. If it becomes necessary to do so, of course we will do that at the proper [200—146] time. But counsel is now under the guise of cross-examination of this witness trying to ascertain from him what he heard concerning the accounts of other coal concerns doing business in San Francisco or elsewhere.

Mr. MOORE.—There has been, if your Honor please, an implication that the occurrence of an overrun constitutes fraud. It is to dissipate that very idea that I desire to cross-examine this witness not only with respect to these other two dealers. That I can do through the medium of cross-examination. But if an overrun constitutes fraud I can say now that every man in the coal business in the United States is also guilty of fraud from the mere fact and circumstance of an overrun. That is just what we object to in this case. If a man has 1.9 overrun or 2.3 overrun or 2.9 overrun, where he has handled two millions of tons of coal in large blocks and quantities, why, by whatever system of weighing, we claim that that does not necessarily and of itself show fraud; considering the proportion of the overrun and the bulk of the commodity handled, it is absolutely inconsistent with any such idea. Now, returning to the matter of cross-examination of this witness, if your Honor please, we submit that counsel himself in his remarks has just emphasized it, that they are trying to make something out of this overrun here, without telling the jury what the overrun amounts to or apparently being willing to disclose that informa-

(Testimony of D. C. Norcross.)

tion, and asking this witness when he first heard of overrun; and in that connection and upon cross-examination we desire to elicit the fact as to when indeed he did first hear of an overrun.

The COURT.—The overrun as disclosed by these reports and books? [201—147]

Mr. ROCHE.—No.

Mr. STANLEY MOORE.—No, he was asked the question—

The COURT.—The objection will be sustained.

Mr. MOORE.—Exception.

The Western Fuel Company first came into possession of the Folsom Street bunkers July 19, 1904. The scale-house was in place, as it now stands, at that time. No change has been made in the bunkers. They were open then as they are now. The only change done there that I can recall is a change in the system of handling the cars from an overhead trolley to a third rail, a mere change in the motive power for the propulsion of the cars. So far as I know, the girders, foundations and substructures upon which the office rests are just the same now as they were when we took over the properties. There may, of course, have been some minor repairs connected with the ordinary up-keep of the business. Those bunkers on Folsom Street have been constructed to my recollection since 1895. In other words, they were there approximately ten years before the Western Fuel Company ever came into possession of them.

BE IT REMEMBERED that thereupon the fol-

(Testimony of D. C. Norcross.)

lowing testimony was given and the following proceedings were had:

"Q. Now, Mr. Norcross, I want to ask you some questions with respect to the dividends that have been paid by this company; and first I want to ask you what is the grand average of dividends that have been paid by the company per year?

A. Slightly in excess of 9 per cent.; just a fraction over 9 per cent. on the capital stock issued.

Q. Slightly in excess of 9 per cent? A. Yes.

Q. In that connection I want to ask of you the further fact whether or not the main business of this company consists [202—148] of the operation of mines and the selling of their output?

Mr. ROCHE.—One moment, may it please the Court; we object to the question as not proper cross-examination. Now, I am perfectly willing, if counsel wants to go into this examination as part of his case in chief, at this time, with the witness upon the stand, so that we may have an opportunity to cross-examine him instead of conducting a mere redirect examination. But this witness' attention upon direct examination was not in any wise directed to any dividends declared upon the company's property; his attention was directed to the minutes; he identified the minutes or testified that the minutes were correct, and the minutes themselves indicated the dividends declared and the percentage of those dividends, some of which amounted to \$10 a month—of those introduced in evidence one of them amounted to \$10 a month.

(Testimony of D. C. Norcross.)

The COURT.—The objection will be overruled.

Mr. STANLEY MOORE.—Read the question.

(Last question repeated by the reporter.)

A. It does.

Q. What is the fact with respect to mining property, as to whether or not there is a depletion of the substance in any business that mainly derives its income from the operation of mines?

Mr. ROCHE.—May it please the Court we make the same objection, and upon the further ground it calls for the conclusion of the witness.

The COURT.—The objection will be sustained. The record does not show that he has any special knowledge in that regard. Everyone knows that if you take coal out of a mine there is that much gone from it, if that is what you mean by [203—149] it.

Mr. STANLEY MOORE.—Perhaps that is a matter of common knowledge, not subject to testimony.

Q. Mr. Norcross, if the company's business was considered right back to its beginning, what do I understand you to say would be the average of dividends or income that has been received from it?

Mr. ROCHE.—Now, just one moment, may it please the Court, that question is objected to upon the ground that it directs the witness's attention to a date anterior to the first day of January, 1904.

The COURT.—The objection will be sustained.

Mr. MOORE.—Note an exception.

Q. Going back then to the first day of January, 1904, Mr. Norcross, what would be the average of the

(Testimony of D. C. Norcross.)

dividends declared as considered or dividing it into years?

Mr. ROCHE.—That is, you mean since January 1, 1904?

Mr. STANLEY MOORE.—Yes, I am now asking since January 1st, 1904.

A. May I look at the Dividend Book?

Mr. ROCHE.—Certainly.

The WITNESS.—Mr. Moore, I am ready to answer that question without the dividend book.

Mr. STANLEY MOORE.—Q. All right.

A. $9\frac{1}{4}$ per cent.

Q. How much? A. $9\frac{1}{4}$ per cent.

Q. $9\frac{1}{4}$ per cent, considering the period back to January 1, 1904? A. Yes.

The COURT.—Q. Does that mean that it averages that much?

A. Yes, for the ten years of that period $9\frac{1}{4}$ per cent.” [204—150]

With reference to the extract which was read here by Mr. Roche from the annual statement of the Western Fuel Company for the year 1906, stating that in that year there has been a veritable coal famine and that the company had had calls upon it at a very inopportune time by companies that had bunkering contracts with it, I would state that the bunkering contracts referred to were those made early in the year, or the preceding year with foreign ship owners for bunkering their vessels arriving at Puget Sound and British Columbia ports. In other words, those bunkering contracts had reference to

(Testimony of D. C. Norcross.)

foreign companies with whom contracts had been made in the previous year to supply their vessels with coal. The portion of that annual statement referring to the tying up of operations in Wyoming, Montana, Utah and Australia simply meant that there was a strike in those places and they could not get cars to ship coal to this market:

"Q. Now, do you recall as to what if anything was done by other companies owning mines in British Columbia, with respect to their bunker contracts?

Mr. ROCHE.—May it please the Court we object to that as not proper cross-examination, and as being immaterial.

The COURT.—The objection will be sustained.

Mr. MOORE.—Exception."

The overage which I stated yesterday I regard as all one overage is estimated regardless of the weights which Mr. Mills charges himself with as going into the barges. I paid no attention to such weights. As long as coal was in the barges it was company coal regarded as in storage. The title of the coal did not change when it went into the barges. The basis or sense of the figures upon which the overage that I mentioned [205—151] is ascertained is this:

"We take the total amount of coal charged to our coal account as weighed in by the Government—deduct from it the sales, and we should have a balance of so much on hand; we would take an inventory of the stock on hand and in all storage places, including the barges, and any difference would be taken up for or against—the overage would be taken up and

(Testimony of D. C. Norcross.)
charged into the coal account."

If I were going to figure, therefore, on the overage of the Western Fuel Company today, I would make an inventory of what was actually estimated to be in the yards and in the barges and regard it all as company coal, then I would add up the custom-house weights for the coal that had been received throughout the period to which the inventory relates, or rather such addition is kept up to date all the time, in addition to the custom weights. I would take the amount of the total sales and by subtracting from such amount of total sales the amount of the custom-house weights and considering the amounts that were actually on hand I would obtain the overage, and, in this process I would ignore completely and would take no account of such quantities of coal as Mr. Mills may or may not have charged as having actually been loaded into his barges.

With reference to the occasion when we ascertained pipes were laid into a large pile of coal down at the yard. At one time I would say that I think there was about five or six thousand tons of coal in the pile and that it was showing signs of heat. I was afraid of spontaneous combustion. The pipes were laid and the hose was turned on the coal and it was flooded. I am not an expert on coal, but I know there is danger of spontaneous combustion in a large amount of coal. [206—152] I have seen some coal burn up that way.

James Dunsmuir had a half interest in the ownership and operation of the barges of which I have

(Testimony of D. C. Norcross.)

spoken from July, 1904, to 1907. The other half interest was held by the Western Fuel Company, which together with James Dunsmuir formed the Western Transport Company. Half of the barge stock was really held by the Wellington Colliery Company, with whom we were working on a joint account at that time, and the Western Fuel Company held the other half.

The margin between the price the Western Fuel Company paid for and the price which they got for imported Australian coal was very narrow, and sometimes there was a loss. The loss has sometimes run up into such high figures as \$200,000 or \$300,000.

(A certain statement or sheet of the coal stock of the Western Fuel Company, as of date March 31, 1906, having been misplaced, it was agreed by counsel for plaintiff and defendants respectively that the amount of coal on hand on April 1, 1906, was between 25,258 and 25,250 tons.)

The annual statements of the Western Fuel Company are intended for the stockholders of the company as well as for the directors.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Q. Mr. Norcross, did you at any time attempt to make any secret of the existence of this overrun, or the fact that the company did have an overrun?

A. No, sir.

Q. Did you see anything strange or to excite suspicion by reason of it?

(Testimony of D. C. Norcross.)

Mr. ROCHE.—That is objected to, may it please the [207—153] Court, as calling for the conclusion of the witness and as immaterial.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Redirect Examination by Mr. ROCHE.

Some of the barges which I named the other day were operated by the Western Transport Company after the first of January, 1904. The Western Fuel Company owned and controlled one-half of the stock of the Western Transport Company. The other half stood in the name of James Dunsmuir, but the Wellington Colliery Company was the owner of it. John L. Howard was president of the Western Transport Company as well as of the Western Fuel Company. The barges were used in connection with the Western Fuel Company's business. The Western Transport Company was engaged in transporting coal in the barges, but I don't believe that they transported any coal other than that of the Western Fuel Company. The crews were employed by the Western Transport Company. It is not my understanding, however, that all of the barges that were in use by the Western Fuel Company after January 1, 1904, and prior to December, 1912, were barges owned by the Western Transport Company. The time up to which the barges were so owned by the Western Transport Company was December 31, 1911, or 1912. Some of the barges were owned by the Western Fuel Company on January 1, 1904. I don't recall the names of the particular barges. Sometime

(Testimony of D. C. Norcross.)

during 1904, and after July of that year, the barges which on January 1, 1904, were owned by the Western Fuel Company, were transferred to the Western Transport Company. John L. Howard has been president of the Western Transport Company continuously since July, 1904. The directors, other than [208—154] John L. Howard, were James B. Smith, and Joseph L. Schmitt, but I don't recall the others, but I can say, however, that the directors of the Western Fuel Company constituted a majority of the directors of the Western Transport Company. That is true, from the date of the incorporation up to December 31, 1913. I was secretary of the Western Transport Company. As a matter of fact I think the Western Transport Company went out of business in the latter part of 1911. When the Western Transport Company went out of business its barges were transferred to the Western Fuel Company. It was in September, 1907, that the Western Fuel Company purchased that portion of the stock of the Western Transport Company which prior to that time it had not owned; so that in September, 1907, this outstanding one-half of the stock of the Western Transport Company, which had been controlled by the Wellington Colliery Company, was purchased by the Western Fuel Company. Therefore, while there were two corporations in existence after that date, the Western Transport Company owning the barges, and the barges doing the business of the Western Fuel Company, all of the stock of the Western Transport Company was in

(Testimony of D. C. Norcross.)

fact owned by the Western Fuel Company; and after this transfer of stock all of the directors of the Western Transport Company were either directors or employees of the Western Fuel Company. The books of the Western Transport Company are in my office. During the existence of the Western Transport Company the barges carried coal for the Western Fuel Company at so much per ton. No statements were furnished, however, from time to time by the Western Fuel Company to the Western Transport Company showing the quantity of coal thus carried. The out-turn weight of the barges was used as the basis for determining the compensation to which the Western Transport Company was entitled. The Western Fuel [209—155] got the figures upon which it paid the Western Transport Company from the delivery tags of all coal delivered ex the barges. Those delivery tags came from Mr. Mills. I presume they coincide with the figures kept by Mr. Mills.

(Referring to a contract entered into between the Western Fuel Company and the Wellington Colliery Company, appearing on page 75 of volume 1 of the minutes of the Western Fuel Company, under date of July 23, 1904, the witness says that the copy of that contract as appearing in said minutes is correct. The following extract from said contract is then read in evidence, the remainder of the contract being deemed to have been read, and the whole document is introduced in evidence without objection:)

“Present: Messrs. John L. Howard, James B.

(Testimony of D. C. Norcross.)

Smith, Sidney V. Smith and Joseph L. Schmitt; absent Mr. J. C. Wilson."

Q. The J. C. Wilson mentioned in these minutes is Mr. J. C. Wilson, the broker? A. Yes.

Mr. ROCHE.—(Continuing.) "The President submitted the contract made with the Wellington Colliery Company, whereupon Mr. Sidney V. Smith offered the following resolution, which was seconded by Mr. J. L. Schmitt and adopted:

"Resolved that the execution by the President and Secretary of the contract with the Wellington Colliery Co., Ltd., and dated July 19, 1904, be and the same is hereby ratified and confirmed, and that said contract be spread at length in the Minute Book of this Company.

"The Wellington Colliery Co., Limited, a corporation organized under the laws of British Columbia, hereinafter called the Wellington Company, and the Western [210—156] Fuel Company, a corporation organized under the laws of the State of Cal., hereinafter called the Fuel Company, intend to furnish jointly, and as far as possible, equally, all the British Columbia Coal that can be sold by the Fuel Company, acting for itself, and as agent of the Wellington Company, in California, for prices satisfactory to the Fuel Company, and, irrespective of the amounts of coal contributed by each, to divide equally the profits of the business of the Fuel Company in dealing with coals of all the kinds referred to in this agreement.

"To that end they agree with each other as follows:

(Testimony of D. C. Norcross.)

“First. The Wellington Company hereby constitutes the Fuel Company its agent for the sale in California of the product of the Wellington Company’s mines in British Columbia, via. Wellington Coal shipped from Ladysmith, Comax Steam Coal shipped from Comox, Comox Anthracite Coal shipped from Comox and Comox coke coal shipped from Comox.

“These coals shall be sold under the names of ‘Dunsmuir’s Wellington’ and ‘Comox.’ The Wellington Company expressly reserves to itself the right to sell coal to any person or persons in California for any price it sees fit, but if the Wellington Company shall sell coal to any person in California other than the Fuel Company, or shall sell coal to any person to be imported into California for sale, the Fuel Co. may at its option rescind this contract.

“Second. It is the intention hereof, that as nearly as possible the quantity of British Columbia Bituminous Coal sold in California by the Fuel Company shall come one-half thereof from the Fuel Company’s [211—157] mines near Nanaimo on Vancouver Island, and one-half thereof from the said mines of the Wellington Company.

“The Fuel Company shall have the right from time to time to require from the Wellington Company the delivery to the Fuel Company of an amount of coal equal to that shipped to California by the Fuel Company and the further right, if the — Fuel Company by reason of the condition of its mines, or fires, accidents, strikes, labor troubles or

(Testimony of D. C. Norcross.)

acts of God, shall be unable to furnish one-half of the amount of British Columbia Coal which it can sell in California, at prices satisfactory to the Fuel Company, to require from the Wellington Company all excess of the British Columbia coal up to its own productive capacity which it can so sell in California over the amount shipped to California by the Fuel Company. The Fuel Company shall ship to California one-half of the amount of British Columbia Coal which it can sell in California at prices satisfactory to itself, and if, by reason of the condition of the Wellington Company's mines, or of fires, accidents, strikes, labor troubles, or acts of God, the Wellington Company shall be unable to furnish an amount of coal equal to that shipped to California by the Fuel Company, the Fuel Company shall further ship to California all excess of British Columbia Coal up to its own productive capacity, which it can sell in California, at prices satisfactory to itself, over the amount furnished by the Wellington Company.

"Third. The Wellington Company shall not furnish to exceed ten thousand tons per month of Comox Steam Coal unless the Fuel Company, in view of the market conditions [212—158] in California, shall require more than this amount.

"Fourth. The Fuel Company shall pay to the Wellington Company for all coal delivered to it by the Wellington Company the following prices, f. o. b. vessels at Ladysmith and Comox."

I don't suppose you want those prices put in, do you?

(Testimony of D. C. Norcross.)

Mr. STANLEY MOORE.—No, it may all be considered as read.

Mr. ROCHE.—(Continuing.) “Eighth. The Fuel Company shall keep separate account books for all business done by it in British Columbia and other coals, which shall be at all times open to the inspection of the Wellington Company, and the Wellington Company shall have the right to have such books experted from time to time by their accountants.

“Eleventh. Monthly statements shall be rendered by the Fuel Company to the Wellington Company showing the amounts of coal imported, the amounts of sales, the amounts of money and coal on hand and the apparent profit.”

“Fourteenth. The Wellington Company shall be entitled to have a representative in the business in San Francisco to watch its interests but in such case he shall be paid by the Wellington Company.”

During the existence of the above contract, monthly statements were prepared by the Western Fuel Company and forwarded to the Wellington Colliery Company by the bookkeeper, Mr. Martin, and myself. It is not a fact that those statements on their face showed overages in coal. I [213—159] did not at any time send to the Wellington Colliery Company a detailed statement of coal, either received by the barges or discharged by the barges; nor did I at any time furnish to the Western Transport Company a detailed statement of coal discharged from the barges. The office of the Western Transport Company and the office of the Western Fuel

(Testimony of D. C. Norcross.)

Company were the same. The books were kept by the same man, and the whole thing was merely a bookkeeping transaction. The bookkeeping for the Western Fuel Company and the Western Transport Company were therefore practically deemed to be one transaction. It is not a fact that the statements furnished by the Western Fuel Company to the Wellington Colliery Company were exactly the same as the statements which have been heretofore produced in evidence. The statements thus produced and introduced in evidence were the coal received statements, whereas the statements that were furnished to the Wellington Colliery Company were the monthly balance sheets and the monthly earning and expense statements, not giving in detail the weight of the coal sold, but merely in dollars and cents. The Wellington Colliery Company never had an expert go over our accounts for the purpose of ascertaining whether those balance sheets were correct. I do not think we ever furnished them statements regarding the quantity of coal laden on the barges and afterwards discharged from the barges for the purpose of enabling them to determine whether or not the balance sheets were correct or for any other purpose.

I recall stating on cross-examination that I regarded the overage merely as general overages, without regarding the particular place or places at which they may have occurred. As secretary of the company I knew long before [214—160] this investigation commenced that part of this overage did take place upon the barges, and I have known that for a

(Testimony of D. C. Norcross.)

number of years. The statements themselves show it. I knew this, therefore, from 1904 to 1912. I also knew during these years that overages existed in the yards of the Western Fuel Company. When I said on cross-examination that I regarded these overages simply as an overage in general, we were talking about inventories and how we arrived at them. I said I did not pay any attention to where the coal was stored, whether it was in a barge, or whether it was in a yard, when I came to make up the overage at the end of the year, or whenever I took it up. In preparing the inventories and in ascertaining the quantity of coal on hand, I took the coal in the bunkers and the coal in the barges, and the coal in the yard as being on hand, and lumped those respective quantities of coal together.

The monthly statements prepared from time to time by Mr. Martin in my office came under my observation. As a general rule I know those statements contained mention of overages.

I was only once present on the Folsom Street dock that I recall to observe the weighing there of imported coal upon the rising beam. I was at the Folsom Street bunkers once during the time the Western Fuel Company had possession of those bunkers.

When I testified yesterday that it was the custom of the Government to weigh coal imported into this country on a rising beam, I was not referring to the practice indulged in at the Folsom Street Dock.

Q. You also testified yesterday afternoon, in response to questions put to you by Mr. Moore, that in

(Testimony of D. C. Norcross.)

weighing the coal out, that is, the coal that was delivered into the possession of the company, you endeavored to weigh that coal accurately; in other words, it was weighed upon what is known as an even scale, instead of upon a rising or a falling scale or beam; you recall that testimony, do you not? [215—161] A. Yes.

Q. That is, the company's endeavor, as far as possible, was to accurately weigh the coal which it already had received into its possession and which it was then selling? A. Yes.

Q. In other words, being given the advantage of the rising beam when it was importing coal into this port, the company does not undertake to give that same advantage to its customers upon the sale of coal; is that correct?

Mr. STANLEY MOORE.—That is not a fair question. The method of weighing coal which has been followed by the Western Fuel Company is exactly and absolutely in accordance with the printed regulation of the Government, intending to give the advantage to the importer. That is a very improper question.

Mr. ROCHE.—I will withdraw the question.

Mr. STANLEY MOORE.—Well, the question never should have been asked.

Mr. ROCHE.—Do I understand you to say that you have a printed regulation advising the custom weighers to give the advantage to the importer? Have you in your possession such a printed regulation?

Mr. STANLEY MOORE.—I don't say that we

(Testimony of D. C. Norcross.)

have it. I understand, however, it is a printed regulation of the United States Government.

Mr. McCUTCHEN.—And you don't deny that, do you, Mr. Roche?

Mr. ROCHE.—Well, I would like to see it. I must confess that while that has been the practice, I have been unable to find any such printed regulation.

[216—162]

Mr. McCUTCHEN.—Well, here it is, Mr. Roche, if you want to see it now.

Mr. ROCHE.—Yes, I would like to see it.

Q. Now, let me ask you this question, Mr. Norcross; I understood you to testify yesterday afternoon that the majority of the sales of coal made by the Western Fuel Company were sales made over its wagon scales.

A. Yes, in from one to five ton quantities.

Q. In from one to five ton quantities? A. Yes.

Q. And those are the quantities which you say the weight of was more or less accurately ascertained?

A. They were accurately ascertained.

Mr. McCUTCHEN.—Mr. Roche, this is a correct copy of the printed regulations issued by the United States Treasury Department, and it says expressly that merchandise shall be weighed on a rising beam. Will you read that to the jury now (handing)?

Mr. ROCHE.—If you say that that is a copy of the custom-house regulations, we have no objection to that being read to the jury. I am willing to admit, as I have heretofore admitted, that it was the practice of the Government weighers to weigh the coal in on a rising beam.

(Testimony of D. C. Norcross.)

Mr. McCUTCHEON.—We understood you to say a few moments ago that there was no such regulation.

The COURT.—No, he said he had not seen a printed regulation. Mr. Roche stated that his understanding was that that was the practice of the Government, but that he had been unable to find any printed regulation.

Mr. McCUTCHEON.—I am not questioning Mr. Roche's statement for a moment, your Honor, and I do not intend to be [217—163] so understood. I would like to have Mr. Roche understand now that there is a book, quite a large book, issued by the Treasury Department, containing instructions to weighers, with reference to the manner in which merchandise of this character shall be weighed. This paper which I have just handed to him is a copy of a clause contained in that printed book. We give him our assurance that this is a correct copy. I now ask him whether he will now read that to the jury, so that they may know what that regulation is, as this testimony goes along.

Mr. ROCHE.—We will admit—I must confess that I don't know what this discussion is over—because we have always admitted that whether there was or was not a printed regulation, that always has been the custom of the custom weighers. If Mr. McCutchen says that that is a copy of the regulation, we will concede it.

Mr. KNIGHT.—And, Mr. Roche, that is in the hands of every custom-house broker, and it does say that merchandise shall be weighed on a rising beam.

(Testimony of D. C. Norcross.)

Mr. STANLEY MOORE.—The discussion arose, Mr. Roche, over the question you asked me whether we had, in our possession, any printed regulation.

Mr. ROCHE.—Yes, because I had never seen such regulation.

I have very seldom been on the barges so as to observe the discharge of coal from them. In testifying concerning the method of discharge I was speaking only partly from personal observation. I saw the operations only once or twice, as I have said. The rest of my testimony is based on hearsay. Even though the coal from the barges is weighed [218—164] by averaging the tubs, if the weights are taken fairly, honestly and accurately, the tubs which are weighed will give approximately the weight of the tubs which are not taken. So that even though the weight of the coal discharged from barges is an average weight that average weight will, if all the tubs are similarly or approximately filled, represent almost the actual weight.

The bills sent out for the Western Fuel Company are prepared by the accountant and the bookkeepers under the supervision of Mr. Martin. Now and then I come in contact with those bills myself. The letter-press book to which you direct my attention contains copies of bills or accounts sent by the Western Fuel Company. In December, 1910, the Western Fuel Company was doing business with the Cumberland Coal Company; that is, they were storing coal for that company from time to time, and charging so much a month for the storage. The Cumberland Coal Com-

(Testimony of D. C. Norcross.)

pany would have a right to obtain delivery of this stored coal at any time they saw fit, and accounts would be kept by the Western Fuel Company showing the amounts left on hand from month to month. Bills would be sent out for this storage. We were not selling coal to the Cumberland Coal Company. The Cumberland Coal Company obtained this coal as a rule from Baltimore by ship.

(A statement from the above-mentioned letter-press book is here offered in evidence, there being no objection, and read, as follows:)

“No. 40. Month, December, 1910.

“Cumberland Coal Company,

to

Western Fuel Company, Dr.

430 California Street,
San Francisco.

“For

Storage on Stock overrun at San Francisco as
follows:

On Hand December 1st, 1910, Nothing

Delivered in December 86 1750 Tons

Storage on Same from May

14 to January 1st, 1911.

7 Months 18 days, a .05 \$32.90

Storage figured from date of

discharge of Ship ‘Acme’ the last Vessel
unloaded at San Francisco.” [219—165]

The coal mentioned in that bill was delivered in December, but it does not say to whom it was delivered. I do not know where it was delivered.

(Testimony of D. C. Norcross.)

I could not say what particular yard of the Western Fuel Company it was deposited in. The storage record would show that. All of the stock of the Cumberland Coal Company is now owned by the Western Fuel Company, but it was not all so owned in December, 1910, when the above entry was made. Part of it was then owned by the Western Fuel Company—60 per cent—the Western Fuel Company thus owning the controlling interest. The president of the Cumberland Coal Company was James B. Smith. The Western Fuel Company in December, 1910, had a majority upon the board of directors of the Cumberland Coal Company. The Cumberland Coal Company did not import coal; it simply dealt in black-smithing coal.

It is a long time since I have been on the Mission Street bunkers. The coal on the Mission Street wharf is discharged from the bunkers. At Folsom Street a ship discharging imported coal is located on the south side of the dock. The offshore bunker there I know to be located toward the easterly end of the dock, and the inshore bunker toward the westerly end. A ship is ordinarily discharging toward the inshore bunker. If we had a vessel at the other end, the barge could not go in so as to draw up to the offshore bunker. The hoppers are located over the inshore bunker, so that if any coal should by any possibility or through any inadvertence fall and locate itself in the cars as the coal was being dumped from the hoppers into the cars, or fall over the sides of the cars, it would not fall into the offshore bunker.

(Testimony of D. C. Norcross.)

because there were boards there to keep it from falling anywhere except on the floor. The coal could not fall into the offshore bunker at the time of discharge because the offshore bunker is at the other end of the bunker. Coal which finally finds its way into the [220—166] offshore bunker has already been on the scales and has been weighed.

The 9 $\frac{1}{4}$ per cent which I gave as representing the dividends of the Western Fuel Company was a general average from January, 1904, to date. In 1912 I think the dividend was ten per cent. There was no single dividend of ten dollars declared in 1912. Two dividends of five dollars were declared on February 4, 1913. I regarded the barges as storage places, but, of course, they are used for transporting imported coal to vessels. That is the only method by which coal can be supplied to those vessels. Our weighers kept records of Folsom Street aside from the records kept by the custom-house weigher of the weight of imported coal discharged from incoming vessels, either into the bunkers or the yards of the Western Fuel Company. The yellow sheets of paper signed by the weigher and sent to the office from time to time show the distribution of coal discharged from a boat, that is, the quantity of coal from a particular ship that went in the offshore bunkers, or in the inshore bunkers, or in the yard, and what quantity of coal was discharged by means of the bunkers directly into a barge. Those sheets would be sent into our office immediately after a ship was discharged.

(Testimony of D. C. Norcross.)

Recross-examination by Mr. MOORE.

Mr. MOORE.—Q. Now, Mr. Norcross, you have stated that the times at which you had reference to in making the answer that the overrun was regarded by you as one general overrun, would be the times that you would be taking an inventory, have you not?

A. Yes.

Q. Now, you have testified that in taking the inventory you ascertained by actual examination, either you, yourself, or by some one acting under you, I presume, the quantities of coal on [221—167] hand in the yard, and in the bunkers and in the barges; in other words, all of the coal of the company that was on hand at the time the inventory should be taken; is that not correct?

A. That is correct.

Q. And then you have figured the quantities of coal, as recorded by the rising beam of the custom-house weights for the period in question, as to which your inventory or overage will relate, have you not?

A. I have.

Q. And the quantities of coal as shown by your sales, from every source, barge, yard and everything; is that correct? A. That is correct.

Q. Now, then, I want to ask you whether or not that is the most accurate way known to you, if not the only way in which to accurately compute the overage?

A. It is the only accurate way we have, as we only keep the one account, the coal account.

Q. The only accurate way for you to compute the

(Testimony of D. C. Norcross.)

verage, which you say you regard as the general overage, as computed at this time is at the time you take an inventory of the stock on hand? A. Yes.

Q. Now, that inventory of the stock on hand, as you have testified to, includes the coal that happens to be at that particular time upon the barges, as well?

A. Yes,

Q. Now, I want to ask you this further fact, with reference to coal on barges and the different uses that are made of the barges in the business of the company. Is it or is it not the fact that when the bunkers are filled and the yards are filled, coal is also laden upon the barges to be stored there as well?

A. Yes, sir.

Q. So that, at times, the barges, or some of them, are used for [222—168] storage purposes, alone; is that not true? A. Yes, that is a fact.

Q. And at other times, all of them will be filled up according to the current orders, so far as discharging into vessels is concerned, when but a small amount of coal might be required to be loaded into them; is that correct? A. That is correct.

Q. You were asked, Mr. Norcross, with respect to the system that was used in the weighing out of coal from the barges into the vessels, and I am now referring particularly to vessels carrying the American flag, upon which the drawback is payable, and I want to ask you with respect to that system, who is that system conducted by, and who is it provided for by, and who is it directed by, if you know?

A. The custom authorities.

(Testimony of D. C. Norcross.)

Q. By the United States Government, is it not?

A. Yes, the United States customs authorities.

Q. I want to ask you this further question in connection with that system, do you know by whom the weighing of the coal done upon such occasions is actually done?

A. By the United States customs weighers.

Q. By the United States customs weighers?

A. Yes.

Q. Now, you stated here yesterday that the system or practice, whichever the word was that was used, was what is known as the system of average, or the practice of average, did you not? A. Yes.

Q. What do you mean by that term in referring to it as a practice, or average, or system of average?

A. The weighing of one tub out of every so many and averaging the balance by the weight of the one.

Q. In point of fact, do you know what the custom is with respect to the average, as to how many tubs it shall be out of [223—169] how many that passes over the side of the ship? A. Four out of sixty.

Q. Four out of sixty, or that would be the equivalent of one out of fifteen? A. Yes.

Q. Do you know what the rules and regulations of the United States Government prescribe in that regard, as to how many it shall be, whether one out of fifteen or one out of fifty?

Mr. ROCHE.—One moment, may it please the Court. That question is objected to on the ground that it calls for hearsay and is not the best evidence. I don't think there will be any question about that.

(Testimony of D. C. Norcross.)

Mr. McCUTCHEON.—We have the regulations.

Mr. MOORE.—We are willing to agree as to what the regulations prescribe. Suppose we read them in evidence right now; this is an opportune time.

Mr. MOORE.—The provision in question, if your Honor please, is known as Article 1487, and is offered in evidence at this time, if it is necessary to make a formal offer.

Mr. ROCHE.—I wish to state, may it please the Court, that there isn't any necessity of offering any of these regulations in evidence, because the Court will take judicial notice of the regulations emanating from one of the State Departments of the Government.

Mr. MOORE.—Of course, the Court will take judicial notice of it and the attorneys are supposed to have judicial notice of it, but we are confronted by the surprising circumstance in this case that Mr. Roche never knew about these regulations until this morning, nor about the rising beam, nor did Mr. Tidwell, either.

Mr. ROCHE.—Counsel ought not to make a statement of [224—170] that kind, because we have consistently and persistently admitted that was the practice. I did say that I never saw it in print.

* * * * *

Mr. MOORE.—Article 1487 is as follows:

“Article 1487. Coal and salt. Coal and salt will be landed under the supervision of discharging inspectors. If the inspector cannot personally take account of the coal”—this relates, gentlemen, to the

(Testimony of D. C. Norcross.)

number of buckets that shall be weighed upon the average system, the particular portion that I am reading now—"If the inspector cannot personally take account of the coal or salt delivered, the weigher is required to designate a competent man to keep the tally, under the supervision of the inspector. At least one tub in every fifty must be accurately weighed, and when weighed care must be taken to have it filled as nearly even as possible. The inspector will see that uniformity is preserved in delivering the coal or salt. Importations of coal, railroad iron, scrap iron, and other bulky merchandise may be weighed upon either platform or railroad scales, upon application of the importer, when the expense of the weighing shall not be increased. In such cases, the weighing shall be done on scales carefully tested, at each weighing, with the United States standard weights."

The other one, relating to the rising beam, provides as follows:

"Article 1482. Before weighing any merchandise the weigher must see that the beam is accurately balanced. [225—171] As correctness of weights depends very much upon the accuracy of the poise, the beam should always be kept clean and be frequently tested with the standard. A fairly even beam indicates the weight, but as, in weighing merchandise, it seldom happens that the beam will stand at an exact poise, but will go either above or below an even beam, the weight will be taken on the rising beam. Weighers are required to mark the weight on each single package weighed."

(Testimony of D. C. Norcross.)

At or about July, 1904, the Western Transport Company owned the barges of which I have heretofore spoken. It also employed the people working on said barges. From or about July, 1904, until September, 1907, a half interest in those barges and in the Transport Company was owned by the Wellington Colliery Company, through James Dunsmuir as the owner. In September, 1907, the Western Fuel Company acquired that half interest of the Wellington Colliery Company in the Western Transport Company. From 1904 until 1907, the barges were operated to the joint account of these owning companies, the Western Fuel Company and the Wellington Colliery Company.

Referring to the bill which was shown me on redirect examination, apparently sent out in December, 1910, by the Western Fuel Company to the Cumberland Coal Company, I would say that the charge made therein for 60 or 80 tons of coal was for storage over a period running from the end of December, 1910, back until May or June, 1910, when the vessel which brought this Cumberland coal, namely, the "Acme," was unloaded.

Q. How is it that upon the 1st of December, 1910, as Mr. Roche [226—172] has stated, there does not appear to have been any coal on hand, but nevertheless during the month of December, 1910, there appears to have been delivered out 87 tons of coal belonging to the Cumberland Coal Company?

A. Well, the Western Fuel Company charged itself up with taking so much Cumberland Coal in

(Testimony of D. C. Norcross.)

whenever that ship was discharged, in May or June, 1910. They made bills for storage and account for deliveries each month, showing the balance on hand at the end of the month on which they collected a 5-cents a ton storage, and they made their November bill that they had sold all of the coal they had stored, whatever the quantity was, and maybe a little bit more, so in December they found they had delivered this quantity of 84 tons of coal; they made their bills showing that they had not on hand on the 1st of December, according to the quantity taken in, as they had delivered, as much as they had taken in, so they billed them for the back storage on that amount of coal, presuming they had it all the time.

Q. Would this be stating the case for purposes of illustration: Assuming that on the 1st of May this steamer "Acme" discharged according to the weights 3,000 tons of coal belonging to this Cumberland Coal Company, which was actually by the Western Fuel Company and delivered out or sold by that company and that by the 1st of December, 1910, they had weighed out on the out-turn weights 3,000 tons of coal, then according to the book account it would be balanced, would it not?

A. Yes.

Q. But if there still remained there 87 tons of coal it would be what might be termed an overage, would it not? A. That is correct. [227—173]

Q. That would manifest itself or show up, to use a slang expression, on December 1, 1910, when the equivalent poundage had been weighed out as that

(Testimony of D. C. Norcross.)

which had been received according to the weights which were taken at the time of the unloading of the ship. A. Yes.

Q. And then that charge for 80 odd tons, why was that made to relate back to the date in May or June at which the vessel had discharged?

A. Because we had only been charging storage on the original quantity weighed in, and if we had actually—it actually on hand at the final cleanup, it was presumed we had it on hand at the start, I guess.

Q. Do you know whether or not that particular coal is dutiable coal? A. It was not.

Q. That was not dutiable coal at all or coal upon which any duties whatsoever were paid, was it?

A. No.

Q. What do you call that coal?

A. Smithing coal, Cumberland coal.

Q. Whereabouts does it come from?

A. From Baltimore, I believe.

Q. It comes from Baltimore.

A. Or from Newport News.

Q. Then in the case of this domestic coal that had been shipped in here by the steamer "Acme" and discharged in May, we will say, 1910, the overage demonstrated itself or showed up in the books on December 1, 1910, did it not?

A. Whenever it was finally cleaned up during December.

Q. Either in December or January? A. Yes.

Q. Thereupon a charge was made by the Western

(Testimony of D. C. Norcross.)

Fuel Company of the amount of that overage which related back to the period and the commencement of the period during which it had been actually [228—174] stored? A. Yes.

Q. Now then, Mr. Norcross, isn't the reason that you have just mentioned the reason why this bill states and charges on the face of it for storage on stock overrun?

A. That is what it is, overrun stock.

At the time that we have been referring to 40 per cent of the stock of the Cumberland Coal Company was owned by the Pacific Coast Coal Company; 60 per cent being owned, as I have heretofore stated on redirect examination, by the Western Fuel Company. The Pacific Coast Coal Company was an entirely outside and separate company from the Western Fuel Company.

Further Redirect Examination by Mr. ROCHE.

The blacksmithing coal of the Cumberland Coal Company was being sold at \$12 and \$14 a ton; and, of course, the Western Fuel Company owning 60 per cent of the Cumberland Coal Company, would receive from time to time 60 per cent of the dividends declared by that company upon its stock. I don't recall the dock at which this Cumberland coal was discharged which came in on the "Acme." This coal that goes to blacksmithing purposes was ordinarily sold to the local trade in San Francisco, and not laden on any ship or barge, but some of it might be shipped by steamer freight. This coal, I presume, was stored either in our yards or bunkers.

(Testimony of D. C. Norcross.)

I have no recollection as to what particular yard it was stored in. When the coal would be taken from our yards to be supplied to the local dealers, it would be weighed from the scales of the Western Fuel Company and by its weighers. The books of the Cumberland Coal [229—175] Company were not in December, 1910, in the possession of the Western Fuel Company. The Cumberland Coal Company had its own office in the Postal Telegraph Building. The daily records concerning the weighing out of this coal were kept in the office of the Western Fuel Company or in the place where the coal was actually weighed. If there were any overages resulting from this coal thus being stored with the Western Fuel Company, the profits resulting from that overage would be distributed 60 per cent to the Western Fuel Company and the remaining 40 per cent to the Pacific Coast Coal Company. The secretary of the Cumberland Coal Company at that time was D. G. Stark. I am now secretary, and have been since September or October, 1911. No duty was payable on this coal to the Government. I do not say that this Cumberland coal was necessarily discharged on some dock in the possession of the Western Fuel Company. I could not tell you whether this particular coal was weighed when it was delivered into our possession. It was customary however to weigh this Cumberland coal when it came into the possession of the Western Fuel Company. It was customary to weigh the coal when it was being discharged. I do not know what the method of weighing is.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—Q. Now, directing your attention again to this item upon which you have been to some extent cross-examined, it is a fact, is it not, that when this coal was finally weighed out of your yard or out of your bunkers or whatever other place this coal was stored, that you sold, or that there was sold rather, whether it was sold by the Western Fuel Company or the Cumberland Coal Company itself, 86 tons, 1770 lbs. more than the actual weight at the time it was placed in storage; is that correct?

A. That is correct. [230—176]

Q. Is it correct, Mr. Norcross, when I say that the books of the Cumberland Coal Company will show the exact out-turn weight of the "Acme" concerning the coal which was stored by the Western Fuel Company out of which this transaction arose?

A. Yes.

Q. And who has possession of those books at the present time? A. I have.

Q. Now, in the final analysis, Mr. Norcross, so far as this particular transaction is concerned, the Cumberland Coal Company having sold a little more than 86 tons of this coal, worth between twelve and \$14 a ton more than it received, according to the weights, it of course made between—it received between \$1032 and \$1300 for that excess or overage coal, did it not?

A. Providing my prices are right, and I think they are.

Q. But depending upon those prices? A. Yes.

Q. Of course, out of that money or out of that

(Testimony of D. C. Norcross.)

profit the Western Fuel Company received 60 per cent and the Pacific Coast Coal Company 40 per cent?

A. They owned those portions of the corporation.

Q. By the way, let me ask you this final question upon that subject, Mr. Norcross; did the Cumberland Coal Company own the mine or mines from which this coal was derived? A. No, sir.

Q. It bought the coal, did it? A. Yes.

Q. Did it buy the coal upon the out-turn weight?

A. I don't know whether it did in that case, or not; I doubt it.

Q. You have no recollection—

A. (Intg.) On the out-turn weight, yes, I think probably they did. [231—177]

Q. Of course, this 86 tons, 1750 lbs. represented that many tons and lbs. in excess of the out-turn weight or in other words, in excess of the coal upon which the purchase price was paid; isn't that true?

A. It represents the out-turn weight, the excess on that portion that was stored with the Western Fuel Company. I don't know whether it was 2,000 tons or whether 4,000 tons or 5,000 tons, that the vessel carried.

Q. In any event, Mr. Norcross, it is true, that if the purchase price was paid upon the out-turn weight, where the whole of the cargo was stored with the Western Fuel Company, or only a part of this cargo was stored with the Western Fuel Company, so far as this 86 tons of overage was concerned, which was the overage of the coal deposited

(Testimony of D. C. Norcross.)

with the Western Fuel Company, the Cumberland Coal Company, did not pay for that coal?

A. No, they did not.

Q. In other words it represents clear profit, don't it? A. Yes.

It is my understanding that on the barges it has been the custom here to weigh one tub in 15 or 4 out of 60. The Pacific Coast Coal Company is still in existence. None of the members of the board of directors of the Western Fuel Company are on the directorate of the Pacific Coast Coal Company.

Mr. ROCHE.—Q. Let me ask you one other question, Mr. Norcross, about this overage, this Cumberland Coal Company overage. The bill which you have presented here dated back, did it not, to the date of the receipt of the entire cargo or part of the cargo of coal by the Western Fuel Company?

A. Yes. [232—178]

Q. In other words, the Western Fuel Company charged the Cumberland Coal Company storage upon this excess coal as though that excess coal had been on deposit in the yard or bunkers of the Western Fuel Company since the date upon which the "Acme" was discharged; isn't that correct?

A. It appears that way.

Q. What appears that way? A. The bill.

Q. The bill appears that way? A. Yes.

Q. In other words, the charge of the Western Fuel Company for storage was upon the out-turn weight of the coal actually stored with the Western Fuel

(Testimony of D. C. Norcross.)

Company plus 80 tons of overage; isn't that true?

* * * * *

A. It was on the total amount delivered.

Q. That is not an answer to my question, Mr. Norcross. Let me put the case in another form by way of illustration: If 1,000 tons of coal had been taken out of the ship "Acme" upon we will say the 1st of July, 1910, according to the out-turn weights; and between the 1st of July, 1910, and the 31st day of December, 1910, there had been sold out of that coal 1100 tons, in other words, an overage of 100 tons, the Western Fuel Company in sending a bill for storage to the Cumberland Coal Company would charge it for 1100 tons as having been stored upon the day upon which the "Acme" coal was discharged from the ship in place of 1,000 tons; isn't that correct?

A. If they followed the directions of that bill, they would, yes.

Q. That was the practice, of course, pursued by the Western Fuel Company?

A. I don't know whether it was or not. But it was done in that instance, anyone can see that.

[233—179]

Q. In other words, Mr. Norcross, if this bill is correct, then there was stored with the Western Fuel Company on the day or dates upon which this vessel the "Acme" was discharged 86 tons of coal in excess of the out-turn weight and in excess of the weight upon which the Cumberland Coal Company paid to the mines for its coal; isn't that true?

(Testimony of D. C. Norcross.)

A. That is possible.

Q. You say it is possible; isn't that true?

A. I don't know that it is true. What if it got rained on, got water in it? Wouldn't the coal have been heavier than originally, if it had taken on moisture? It is the finest kind of coal that comes into the market; it is made up of fine coal, and it will hold water more than any other coal will.

Q. You say that it will hold water? A. I do.

Further Recross-examination by Mr. STANLEY MOORE.

Even with respect to domestic coal, in connection with which no duty is to be paid at all, the Western Fuel Company insists upon having a representative of the ship present when the coal is being weighed out. This representative is called a weigher or checker. When foreign or imported coal is discharged, there is, as a general rule, present a government official—who actually performs the weighing,—a checking clerk representing the Western Fuel Company, and the clerk representing the ship.

[Testimony of G. L. Hahn, for the Government.]

G. L. HAHN, a witness called for the United States and sworn, testified as follows:

[Endorsed:] Filed Jan. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [234—180]

Direct Examination by Mr. ROCHE.

I live in San Francisco. I am now employed by the Western Fuel Company, and have been off and

(Testimony of G. L. Hahn.)

on for a number of years. I am now employed at the Green Street bunkers. I have been employed for a number of years on and off upon the Folsom street bunkers as a weigher or assistant weigher, checking the weights of the custom-house officer. I make a record of the weights I get in a book. The customs-house officer calls out the weights and I see that the beam is correct and I put them down in this book. I am familiar with the Folsom street bunkers, and know what are the offshore and inshore bunkers respectively. There are about 22 or 23 pockets or compartments in the offshore bunker. The pockets are divided by partition walls that extend from the floor of the bunker to the top. When the imported coal is being discharged from an incoming vessel, the hoppers are spotted over the inshore bunker.

(Admitted by counsel for the defendants that the ordinary practice or custom pursued there is to spot or locate the hoppers opposite each hatchway in the vessel, but over the inshore bunker.)

After a load of coal is weighed it is sometimes sent to the offshore bunker. They always try to keep a record of what particular compartment or pocket in the offshore bunker the coal they have weighed is discharged into. I keep that record in my book. Only coal that is weighed goes into the offshore bunker,—that is, so far as I am concerned. Whenever coal is to be deposited in any of the pockets of the offshore bunker, it is first weighed and then dumped into the particular pockets or compart-

(Testimony of G. L. Hahn.)

ments. The weight of the coal which goes into the particular compartment or pocket of the offshore bunker is recorded in this book by me. If coal was on the ship first, it would be weighed before being placed in the compartments or pockets of the offshore bunker. Sometimes coal that goes into the offshore bunker comes from the yard and sometimes from the ship. When it comes from the ship it invariably goes over the scales first and is weighed. A record is [235—181] kept by me of the weight of this coal. This record shows the particular compartments or pockets into which the coal thus weighed was dumped. The coal which comes from the yard is also weighed before being dumped in the offshore bunker; so that, as far as I know, all coal, whether coming from a vessel or from the yard, is first weighed before going into the pockets or compartments of the offshore bunker, and the weights are recorded in a book with reference to the pockets. Mr. Mayer is one of the weighers on the Folsom street dock. I guess he does most of the weighing for the Western Fuel Company.

(Admitted here by counsel for defendants that the signature attached to a certain document now shown to the witness is the signature of Mr. Mayer.)

This document now shown me is not the daily record which I kept when I was on the Folsom street dock. I made my record in a book. The signature to this document is not my signature. The weights that I got were first recorded in a tally-book. From

(Testimony of G. L. Hahn.)

that tally-book some person (at the end of the day) compiles the records, a sample of which is now shown me. I turn my accounts over to Mr. Mayer at the conclusion of the day's work, and these daily report sheets—one of which is now shown me—are compiled by him from those records.

(Admitted by counsel for the defendants that the sheet now in Mr. Roche's hands is one of a series of sheets similar in kind that are filled out each day at the Folsom street dock, and that the sheets contain a summarization of the discharge of the entire cargo upon the boat; this admission is subject to correction.)

Mr. ROCHE.—I just want to call the jury's attention to this, may it please the Court, at this time. I [236—182] will say, gentlemen, that we have already introduced in evidence the invoices and likewise the bill of lading and the consumption on discharge of this particular cargo, which shows that upon the out-turn weight the cargo was 108 tons, 1780 lbs. short.

Mr. OLNEY.—Which cargo is that?

Mr. ROCHE.—This covers the discharge of New Wellington coal from the "Titania" at Mission street wharf in April, 1911. This is the Mission street wharf record. The records I presume are the same.

Mr. STANLEY MOORE.—This is not the Folsom street record?

Mr. ROCHE.—No.

Mr. MOORE.—She was 108 tons short on what cargo?

(Testimony of G. L. Hahn.)

Mr. ROCHE.—On a cargo of New Wellington coal.

Mr. STANLEY MOORE.—Of how much?

A. Of 5,555 tons.

Q. This is the Western Fuel Company Daily Report, N Wellington Coal, discharged ex—"Titania," April 20, 1911. Hoist No. 1— Let me ask you whether you will also make this admission: these reports show, do they not, the weight of coal discharged from each hoist?

Mr. STANLEY MOORE.—I presume they purport to show that.

Mr. ROCHE.—They show the recorded weights there.

Q. Let me ask you, Mr. Hahn, this question, while counsel is examining that report.

Mr. STANLEY MOORE.—That purports to show that.

Mr. ROCHE.—Is there a record of the discharge of coal from each hoist? A. Yes. [237—183]

Q. That is one of the hoppers which is located upon the tracks or upon the rails there?

A. They have four hoists there and they keep a record of each one; that is, I have always done it.

Q. That is, there is one hoist opposite each hopper; is that correct? A. Certainly.

Q. And of course opposite each hatchway in the vessel from which coal is being discharged?

A. Yes.

Q. And there is a record kept of the actual discharge from each hopper? A. Yes.

Q. Representing of course the coal taken out of

(Testimony of G. L. Hahn.)

each hatchway of the vessel? A. Certainly.

Mr. STANLEY MOORE.—We will admit that these blanks were customarily kept and filled in as is indicated by these printed pages.

Mr. ROCHE.—I am willing to take an admission subject to any correction that you may desire to make, so that counsel will not be bound by the admission.

“New Wellington Coal. Discharged ex-Titania, April 20, 1911. Hoist No. 1.” This evidently was average coal. “211 tons 1600 lbs. Hoist No. 2,268 tons, 1340 lbs. Hoist No. 3, 236 tons, 1370 lbs. No. 4 Hoist, 235 tons; 1030 lbs. Total 952 tons, 760 lbs.” Now, on the other side is the destination of this coal: “To Wharf Bunker 186 tons, 1450 lbs.”

(The witness here explains that the wharf bunker last referred to is the inshore bunker.)

Mr. ROCHE.—“To Wharf Bunker 16 tons, 1450 lbs. To Yard, nothing. Barge “Thebold” 725 tons, 1300 lbs.”

It sometimes happens that while a boat is discharging into these hoppers opposite the ship and located over the inshore bunker, there is a barge loading at the offshore bunker. The coal discharged into the barges is taken from the pockets or compartments of the offshore bunker. It is done in this way. Take for instance pocket 17, there may be 50 tons in that pocket, and we are going to feed the barge from that pocket. We empty the 50 tons out on to the barge. We have a record of how many tons there are in the pocket, also the pounds. [238—184] If you wish to get 100 tons of coal upon a particular barge, and

(Testimony of G. L. Hahn.)

there are only 50 tons in a particular pocket, you empty out that coal first, and then bring more coal into the pocket, and from the pocket on to the barge.

Mr. ROCHE.—Continuing reading this Report: “Barge ‘Thebold’ 725 tons, 1300 lbs. Offshore bunkers 40 tons, 250 lbs. Total, 952 tons, 760 lbs.” These figures equal in the total the exact amount of coal discharged as shown by the daily report. Now, at the bottom of that in the left-hand corner is this statement: “Invoice 5575.” That of course you will concede indicates tons?

Mr. McCUTCHEN.—Yes.

Mr. ROCHE.—“Discharged 952 tons, 760 lbs. Balance 4622 tons, 1480 lbs.”

Now, you will concede also, will you not, that from the invoice weight upon this daily report is deducted the quantity discharged and the balance refers to the balance supposed to be in the vessel according to the invoice weights.

Mr. STANLEY MOORE.—That is what it purports to state. I do not think there is any occasion to take up very much time on that. The whole matter can be considered read in evidence, so far as we are concerned.

Mr. ROCHE.—You will also concede without the necessity of my reading this to the jury, that the same daily report is made each day until the boat is discharged, and in the left-hand corner each daily report commences with the balance supposed to be in the boat according to the invoice weight.

Mr. STANLEY MOORE.—That is what the re-

(Testimony of G. L. Hahn.)

port ought to contain, and I presume they do. [239—
185]

Mr. ROCHE.—Now, I want to read to the jury a summary of the coal discharged from the boat itself to which all of these tags are attached: “Western Fuel Company. Summary of New Wellington Coal discharged ex ‘Titania,’ Mission street wharf, April, 1911. Date, 1911. April.” Without reading this in detail I will just state what it purports to show. It discloses the various dates upon which the boat was discharged; it shows the number of tons and the lbs. discharged from each hoist, No. 1, Hoist No. 2, Hoist No. 3 and Hoist No. 4. It also indicates the total number of tons and lbs. of coal discharged from the vessel each day, being the aggregate number of tons discharged from each hoist. Then at the end it shows the destination of the coal. It was in that we were particularly interested, and I will just read that part. I might state to counsel we are doing this for the purpose of demonstrating, if I may use that expression, that the Western Fuel Company did know each lb. of coal that went into this offshore bunker.

Mr. STANLEY MOORE.—We are ready to give you an admission that will facilitate getting it into the evidence, but do not stop and try to argue it.

Mr. ROCHE.—This was the ultimate destination of this cargo of coal: “725 tons, 1300 lbs. went into the barge ‘Theobold.’ 40 tons 250 lbs went into the offshore bunker.” That was on April 20th. On April 21st, 52 tons, 480 lbs. went into the barge “The-

(Testimony of G. L. Hahn.)

bold." 528 tons, 390 lbs. went into the barge "Nanaimo." On April 22, 241 tons, 1180 lbs. went into the same barge, and on the same date 695 tons, 1200 lbs. went into the barge "Comanche." On April 24th, 115 tons, 1420 lbs. went into the barge "Comanche," and 25 tons, 1650 lbs. into [240—186] the offshore bunkers. On April 25th, the final date of discharge, 251 tons, 1260 lbs. went into the offshore bunkers, making a total of 2678 tons, 170 lbs. that went into the barges or compartments of the offshore bunkers.

Will you mark that as an exhibit, Mr. Clerk?

(The paper was marked "U. S. Exhibit No. 124.")

[**Testimony of W. H. Tidwell, for the Government.**]

W. H. TIDWELL, called for the United States and sworn, testified as follows:

I live in San Francisco. I am connected with the Treasury Department of the United States as Special Agent, in charge of the 17th Special Agency District. I have been connected with the Department as Special Agent for about 4½ years, and with this particular district during that entire period. My investigations in connection with the subject matter of this indictment began in August or September, 1912. I have in the course of my investigation made an examination of some of the books, records, papers and vouchers of the Western Fuel Company. I began such last-mentioned examination about the middle of February, 1913. I do not claim to be a certified accountant, but I have had some experience in accounting for the last twenty years. I have examined numerous

(Testimony of W. H. Tidwell.)

accounts of various firms in connection with values and in connection with frauds alleged to have been perpetrated on the Government, and which were under investigation by the Government. I have also been appraising officer, and have investigated many firms in connection with their importations. I have made a computation with reference to the quantity of foreign coal imported into this port by the Western Fuel Company between the 1st of [241—187] April, 1906, and the 31st of December, 1912. I have made an examination of the books and records of the Western Fuel Company for the purpose of ascertaining the difference between the invoice and bill of lading weight on the one hand and the out-turn weight on the other hand of foreign coal imported by the Western Fuel Company into the State of California, from April 1st, 1904, to December 31, 1912; and in connection with that examination I had access to the records of the custom-house. I made a comparison between the invoice and bill of lading weight and the out-turn weight of each one of those cargoes coming into this port between those dates. I also made an examination of the custom-house records relative to drawbacks claimed by various steamship companies upon boats which the Western Fuel Company supplied with coal.

Q. Will you at this time, Mr. Tidwell—and it will avoid examination hereafter—explain to the jury what you mean by a draw-back claim?

A. The drawback paid during the time of this investigation was under two tariff acts, the Tariff Act

(Testimony of W. H. Tidwell.)

of 1897, paragraph 415, I believe it is, which provides for the payment of 67 cents per ton on all foreign coal imported into the United States on which duty has been paid, which is laden on American bottoms bound for foreign countries, for fuel, the amount of drawback so claimed to be paid to the vessel—or the amount of duty, rather, which is the same thing.

Q. That is paid by the owner of the vessel into which the coal is laden for fuel purposes?

A. Yes, sir; and under the tariff act of 1909, paragraph 418, a duty of 45 cents per ton is levied, which is returned to the ship under the same conditions.

[242—188]

Q. That is, the custom duties are returned, in so far as they relate to the coal upon which it is paid, and which is subsequently laden into an American registered vessel foreign bound, and to be used for fuel purposes?

A. To be used for fuel purposes, yes.

Q. Did you also make an examination of the books, papers and records of the Western Fuel Company for the purpose of ascertaining the quantity of coal which the Western Fuel Company claimed it had sold and delivered to these various boats upon which drawbacks had subsequently been claimed?

A. Not as one item, but I did make an examination as to the entire amount of sales during that period.

Q. Did you, as a result of these examinations and investigations to which you have referred, make calculations for the purpose of determining the shortage, if there was any shortage, between the invoiced

(Testimony of W. H. Tidwell.)

weight and the out-turn weight of cargoes of coal imported by the Western Fuel Company into the United States between those two dates? A. I did.

Q. And did you likewise make computations for the purpose of ascertaining and establishing the quantity of foreign coal received from all sources by the Western Fuel Company during the same period of time? A. I did.

Q. Did you also make an examination of the records of the Western Fuel Company, such as were available, for the purpose of ascertaining the quantity of foreign coal on hand and in [243—189] the possession of the Western Fuel Company on the first day of April, 1906?

A. I examined a record which was presented to me by Secretary Norcross.

Q. And which purported to state the coal on hand on that date, that is, the foreign coal? A. Yes.

Q. Did you also make an examination of the records of the Western Fuel Company for the purpose of establishing the quantity of foreign coal sold by the Western Fuel Company between the first day of April, 1906, and the 31st day of December, 1912?

A. I did.

Q. And did you also make an examination of their records for the purpose of ascertaining the quantity of foreign coal which was upon hand on the 31st of December, 1912?

A. I made no specific examination as to the amount on hand at that particular time, but I accepted the statement of Mr. Norcross as to the amount on hand

(Testimony of W. H. Tidwell.)
at that particular time.

Q. That is, that was on hand on that date; is that correct? A. Yes.

Q. And did you, as the result of that examination, ascertain whether there was any difference between the quantity of foreign coal which the Western Fuel Company had received during that period of time, added to the quantity of coal which it had on hand on the first day of April, 1906, and the quantity of foreign coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, plus the amount of coal then on hand?

Mr. STANLEY MOORE.—I would like to make this suggestion: Does that question have reference to the amount of coal received by the Western Fuel Company from April 1, 1906, to December 31, 1912, by custom-house weight, or what? [244—190]

Mr. ROCHE.—By both custom-house weight and also by invoice weight.

A. I made a computation showing both the invoice weight and the ascertained weight, or the weight upon which duty had been paid.

Q. By the way, during that examination, Mr. Tidwell, did you ascertain whether portions of cargoes of coal imported into the United States had been purchased by the Western Fuel Company and discharged into its bunkers?

A. The records of the company show that many smaller purchases were made, not full cargoes.

Q. In determining the weight of portions of cargoes purchased or received by the Western Fuel

(Testimony of W. H. Tidwell.)

Company, that is, of imported coal during that period of time, did you take the out-turn weight or the invoice weight? A. You mean of partial cargoes?

Q. Yes.

A. I used one weight for both the invoice and the out-turn weight.

Q. And that was the out-turn weight?

A. That was the out-turn weight, according to their records.

Q. Of course, it was impossible for you to make any calculation upon the invoice weight, because of the fact that the Western Fuel Company only received a part of the cargo?

A. It only received a part of the cargo, and it might have been purchased from various people, for instance it might have been purchased from the Pacific Coast Company and other dealers, and there was no way of determining on what particular vessel that coal was imported.

Q. So, so far as that part of the cargo was concerned, you were obliged to, and in fact you did assume that the out-turn [245—191] weight was correct in making the calculation? A. Yes.

Q. And that the Western Fuel Company only received that quantity of coal indicated by the out-turn weight? A. Yes.

Q. Did you examine the books and records of the Western Fuel Company for the purpose of ascertaining the various places to which foreign coal thus imported by it between these two dates would be distributed?

(Testimony of W. H. Tidwell.)

A. The principal points were San Francisco and Oakland. Some was sold at San Diego. I think there was one or possibly two cargoes at Los Angeles. I think there was one at Santa Barbara and one at Eureka.

Q. Did you also examine the records of the Western Fuel Company for the purpose of ascertaining the quantity of coal which the Western Fuel Company claimed it had sold to the owners of various vessels?

A. Laden on barges, do you mean?

Q. Yes, first laden upon barges? A. I did.

Q. Including, of course, to American registered vessels, foreign bound, upon which subsequently drawbacks were claimed? A. Yes.

Q. And did you in that connection likewise make an investigation of records disclosing the quantity of foreign coal loaded from time to time on transports and boats belonging to the United States Government? A. I did.

Q. I would like to have you go on in your own way, Mr. Tidwell, so that I will not be compelled to put a leading question to you, and state the character of the calculations made by you.

A. In what is known as Exhibit "A," we first took into consideration [246—192] the amount of coal on hand on the first day of April, 1906; then by months added to that amount, arriving at the total amount which it received throughout each month during that particular period, indicating the invoice number, the name of the vessel on which the coal was

(Testimony of W. H. Tidwell.)

imported, or from whom the coal was purchased, the invoice weight, the ascertained weight, the shortage or overage, if any, finally arriving at the totals of the amount received from April 1, 1906, to December 31, 1912.

Q. Now, before you refer to any other exhibit, Mr. Tidwell, I want to call your attention to a statement which is marked Exhibit "A," entitled "Statement showing coal on hand April 1, 1906, and the receipts of coal from all sources by the Western Fuel Company from April 1, 1906, to December 31, 1912"; this exhibit was prepared, was it not, under your direction and at least in greater part by yourself?

A. I should say that practically every figure on it had been noted by me, because I checked it several times.

Q. This is the exhibit, of course, to which you have just referred; is that correct, Mr. Tidwell?

A. Yes, Exhibit "A."

Q. I notice that the first item, so far as figures are concerned, appearing on the first page of this exhibit, is as follows:

"Balance, April 1, 1906, 25,258 tons"; what does that indicate?

A. That amount was shown by this sheet of the Western Fuel Company which has not been produced.

Q. That indicates the quantity of foreign coal on hand, in the possession of the Western Fuel Company, in the State of California; is not that correct?

A. Well, it is presumed to be in the State of Cali-

(Testimony of W. H. Tidwell.)

fornia; it is [247—193] in the possession of the Western Fuel Company, taken up by the offices of the Western Fuel Company of San Francisco, and shown to be on hand at this depot.

Q. And that, of course, would include the coal on hand at Oakland?

A. Yes, Oakland and San Francisco.

Q. And you understand, or did understand from the records of the Western Fuel Company, that whatever coal may be entered through the port of San Diego—

Q. (Intg.) That is not included in that balance at all. The coal entered at San Diego was sold by the shipload, as I understand it.

Q. Now, directing your attention to this exhibit, so that the record may show exactly to what it refers, in the upper left-hand corner appears the words, "Entry number"; immediately under that, and under the word "balance," to which I referred a few moments ago, appears "1906, April"; this exhibit shows, does it not, in months, in calendar months, all foreign coal imported by the Western Fuel Company?

A. Yes, sir.

Q. And the numbers appearing, other than the date, upon the extreme left-hand side of each page of this exhibit, indicates the entry number?

A. The entry number on which the coal was entered for duty.

Q. And that is the entry number at the United States Custom-House at the port of San Francisco?

(Testimony of W. H. Tidwell.)

A. Yes, and those entries are here as a part of the exhibit in this case.

Q. In the second column appears what?

A. The name of the vessel on which the coal was imported, or the party or the concern from which the coal was purchased.

Q. And the third column indicates what, under the title, "Invoice [248—194] weight, tons"?

A. The consular invoice, or the commercial invoice of the concern from which the company purchased the coal; it is the weight upon which it was purchased by the company.

Q. There were introduced in evidence yesterday, Mr. Tidwell, a number of invoices, as well as a number of bills of lading; the invoices which are referred to in this exhibit were the invoices which were introduced in evidence yesterday; is that correct?

A. In so far as it pertains to consular invoices; no invoices of coal purchased locally by the Western Fuel Company in small lots have been introduced in evidence; they are not in the possession of the Government.

Q. In other words, you mean in partial lots?

A. In partial lots.

Q. And, as you have already testified, in so far as those partial cargoes or lots are concerned, you have taken the out-turn weight as being the true and correct weight?

A. Yes, that was accepted from the statements furnished by the Western Fuel Company as being correct.

(Testimony of W. H. Tidwell.)

Q. And it is also true, is it not, Mr. Tidwell, that in every instance the invoice weight, which you refer to, the consular invoice weight and the bill of lading weight agree? A. Yes.

Q. And the invoice weight, of course, is the weight of the coal at the country of exportation?

A. Yes.

Q. So in the third column you have the invoice weight, which is also, as you have testified, the bill of lading weight? A. Yes.

Q. The fourth column is entitled "Ascertained weight"; that means, does it not, the out-turn weight?

A. The out-turn weight at San Francisco. [249
—195]

Q. That is the weight of the coal as weighed upon the discharge of the vessel at San Francisco?

A. Yes.

Q. And it is a fact, is it not, Mr. Tidwell, that it was upon the ascertained weight or the out-turn weight that duties were paid to the United States Government; is that correct?

A. Yes, except in a few instances of dispute, where there were great shortages, in which the Western Fuel Company or the importer paid on the invoice weight.

Q. That is, where the liquidated weight was by the collector made the invoice or bill of lading weight; is that correct? A. Yes, sir.

Q. In the next column, which is entitled "Short tons and pounds" is inserted the amount of short-

(Testimony of W. H. Tidwell.)

age, if there was any shortage, the difference between the invoice or bill of lading weight and the out-turn weight at the port of San Francisco? A. Yes.

Q. And in the next column, which is entitled "Over, tons, pounds" is inserted the excess above the invoice or bill of lading weight, and between that and the out-turn weight? A. Yes, sir.

Q. In other words, for the purpose of illustration, if the invoice weight was 5,000 tons and the out-turn weight at San Francisco, when the coal was discharged, was 5,100 tons, under this column to which I am now directing your attention there would be 100 tons, which would indicate the excess weight or overage; is that correct? A. That is correct, yes.

Q. In the last column, which is contained upon each one of these sheets is the word "Anthracite, tons, pounds"; that refers to coal upon which no duty was paid, does it not?

A. That is my remembrance about that, that anthracite was not [250—196] dutiable under the tariff.

Q. And for that reason you deducted the quantity of anthracite coal in this computation for the purpose of evening up the cargoes?

A. As a matter of fact, Mr. Roche, I put it there for convenience, simply, whether there would be any question whether it was dutiable or not dutiable. It really cuts no figure in the tabulation.

Q. And that same explanation would apply to each page of the exhibit, would it? A. Yes.

Q. And this exhibit does contain a reference to

(Testimony of W. H. Tidwell.)

every cargo of foreign coal that was imported in the State of California, outside of San Diego, by the Western Fuel Company, between April 1, 1906, and the 31st day of December, 1912, and inclusive of both of those dates?

A. It goes a little further than that, Mr. Roche; it also includes whole cargoes which were purchased by the Western Fuel Company from other importers as well as that imported into the port of San Diego. For instance, Hind, Rolph & Company, J. J. Moore & Company and others imported whole cargoes which were sold direct to the Western Fuel Company; it also includes those. That is a statement of all the coal received by the Western Fuel Company; that is the out-turn weight of all the coal received by the Western Fuel Company during that period.

Q. And upon which duty was paid?

A. And upon which duty was paid.

Q. It also includes, does it not, the invoice weight of coal received by the Western Fuel Company upon the occasions when the Western Fuel Company would purchase an entire cargo?

A. Yes, either an entire cargo or a part of a cargo.

Q. In so far as the part of a cargo was concerned, does it also [251—197] show the invoice weight?

A. It shows the invoice weight to be the same as the purchase weight.

Q. The last sheet of this exhibit—

(Testimony of W. H. Tidwell.)

Mr. DUNNE.—Mr. Roche, before you get to the last sheet, I would like to ask what does he mean by these initial letters, for instance "A," "B," and so forth. For completeness sake, he might explain that.

A. That refers to several invoices, or rather, several entries on which that coal was made, marked 4369 A and B.

Mr. ROCHE.—I think, Mr. Dunne, that entry 4369 A and B was the invoice which I read into evidence and to the jury yesterday.

Q. In other words, where there are two invoices in a case such as that, it would indicate that a part of the cargo was taken on at one point and part at another; is not that correct? A. Not necessarily.

Q. Do you recall that particular shipment, Mr. Tidwell?

A. No, I don't recall that particular shipment.

Q. For the purpose of illustration, if part of a cargo were taken on at Nanaimo and the boat completed the cargo at Ladysmith, and both portions of the cargo were consigned to the Western Fuel Company, there would be two invoices, would there not?

A. Yes. I can explain it, if you will pass me the entry.

Q. The entry, itself?

A. Yes, the entry and the invoice.

Mr. DUNNE.—Mr. Roche, I did not mean to interrupt the examination to this extent.

Mr. ROCHE.—Oh, that is all right. I think it might be advisable at this time for the witness to ex-

(Testimony of W. H. Tidwell.)

plain the entry. This is the entry, Mr. Tidwell, which I read into evidence yesterday (handing).

[252—198]

A. In this instance, it refers to two invoices; one No. 4369A, of 2115 tons of coal from Ladysmith; the other refers to invoice No. 4369B, of 3686 tons of coal from Nanaimo.

The COURT.—Q. Making one cargo?

A. Making one cargo of 5,801 tons.

Mr. ROCHE.—Q. Those were the two invoices, Mr. Tidwell, which I read into evidence yesterday, and which were explained to the jury; but it quite frequently happens, does it not, Mr. Tidwell, that a cargo loaded upon a ship at one port may be consigned to two or more persons, that is, half the cargo to one and half the cargo to the other, and in that case, too, there would be two separate invoices, as well as two separate bills of lading?

A. And would also be two separate entries.

Q. In other words, each consignee would have to make a separate entry? A. Yes.

Q. And in that case there would be two invoices?

A. Yes, sir, two invoices.

Q. The last page of this Exhibit "A" to which you have referred is a statement entitled as follows: "Summary showing total invoice and ascertained weights of coal on hand and received by Western Fuel Company from April 1, 1906, to December 31, 1912; also Total Shorts and Overs"; in other words, the table which is contained upon the last page, being page No. 40 of this exhibit, shows the total weight

(Testimony of W. H. Tidwell.)

for each year, of each invoice relating to the cargo of coal which was received by the Western Fuel Company into this port, whether consigned to it or consigned to somebody else and sold to it; is not that correct?

A. Yes; you should have said in your question, all invoices in a particular year, instead [253—199] of each invoice in a particular year.

Q. In other words, the first column refers to the year? A. Yes.

Q. And the second column refers to the invoice weights of all cargoes received by the Western Fuel Company for that particular year?

A. For that particular year, yes.

Q. That is in tons and pounds?

A. In tons and pounds.

Q. In the third column relates to the out-turn weight? A. The out-turn weight, yes.

Q. And the fourth column contains a total for each year of the shortages? A. Yes.

Q. And the fifth column contains a total for each year of the overages? A. Yes.

Q. And the "shortage" refers to the difference between the out-turn weight and the invoice or the bill of lading weight, that is to say, where the out-turn weight is less than the invoice or bill of lading weight? A. Yes.

Q. And the word "overages" refers to where the out-turn weight is in excess of the weight as shown by the invoice or the bill of lading? A. Yes, sir.

Q. That is to say, in the case that I have last re-

(Testimony of W. H. Tidwell.)

ferred to, the overage is where the out-turn weight exceeds the invoice or bill of lading weight, and under the word "short" it is where the out-turn weight is less than the invoice or bill of lading weight?

A. Yes.

Mr. ROCHE.—I would like to have it understood that this exhibit is actually read into evidence.

* * *

Mr. DUNNE.—Mr. Roche, before you offer it in evidence, will you ask Mr. Tidwell what he means by "O 17" on the first page? [254—200]

Mr. ROCHE.—What does that mean, Mr. Tidwell? A. Oakland, Entry No. 17.

Q. And what does "S D" mean?

A. San Diego.

* * * * *

Q. Will you indicate at this time, Mr. Tidwell, so we may have your answers in the record, exactly what papers you used and what records were resorted to by you for the purpose of making your computations upon which this Exhibit "A" is based?

A. The first record that I had from the Western Fuel Company was their vouchers showing payments for coal; next, the monthly statements showing coal received; and also the custom-house entries and invoices.

* * * * *

Mr. DUNNE.—I presume, Mr. Roche, that Mr. Tidwell will testify that these computations are correctly made.

Mr. ROCHE.—Yes.

(Testimony of W. H. Tidwell.)

The WITNESS.—Yes, I will testify to that.

Mr. ROCHE.—The total weight, according to the invoices, of all cargo, would be as follows: 2,159,551 tons, 1,147 pounds.

Mr. McCUTCHEN.—That is the invoice weight.

Mr. ROCHE.—That is the invoice or bill of lading weight. The invoice weight and the bill of lading weight agree on all cargoes. The out-turn weight, that is, at the port of discharge, is 2,138,831 tons, 473 pounds. The shortage—

Mr. McCUTCHEN.—Mr. Roche, have you the percentage of difference there?

Mr. ROCHE.—No, we have not.

Mr. STANLEY MOORE.—It is nine-tenths of one per cent. [255—201]

Mr. ROCHE.—Of course, that is not accurate, for this reason.

* * * * *

Mr. ROCHE.—Q. Let me ask you, Mr. Tidwell, in that connection: You have already testified that in some instances the Western Fuel Company received only a part of a cargo. A. Yes.

Q. That is, if a cargo of coal were destined or consigned to some third party in San Francisco or elsewhere, and part of that coal would be sold to the Western Fuel Company and the remaining part of that cargo to some other company or other companies; that is a fact is it not? A. Yes.

Q. It is also true, is it not, that in a great many of these instances there would be a shortage between what is known as the invoice or bill of lading weight

(Testimony of W. H. Tidwell.)

and the out-turn weight; that is correct, too, is it not? * * *

A. I could only assume that that is true; I don't know what the original weight of a cargo would be.

Q. And, of course, the only way you could ascertain that to be true is by taking the out-turn weight of a part of cargo which was sold to the Western Fuel Company and following up and checking that part of the cargo which was sold to some other person, firm or corporation; is not that correct?

A. Yes.

* * * * * * * * * *

Q. And, of course, the out-turn weight of the coal delivered to the Western Fuel Company, plus the out-turn weight of the remaining part of the cargo would show the out-turn weight of the entire cargo?

A. Yes, sir.

Q. And a comparison between that out-turn weight and the invoice [256—202] or bill of lading weight would show whether the weights tallied or whether there was a shortage, or an overage; is not that correct? A. Yes.

Q. Now, as I understand your testimony, in each instance where the Western Fuel Company purchased only a part of a cargo, instead of following that out and ascertaining whether there was a shortage, by adding all of the out-turn weights together and comparing the total result with the invoice or bill of lading weight, you had to take the out-turn weight of the coal delivered to the Western Fuel Company as the true and correct weight.

(Testimony of W. H. Tidwell.)

Q. Yes, and in so far as the percentage was concerned I gave them the benefit of it in that way.

Q. And, of course, that had to be done by you because in a case where there was a shortage and two or more persons purchased parts of the cargo it would be impossible for you to tell where the shortage occurred, and the exact amount of shortage that ought to be charged up against the Western Fuel Company or that ought to be charged up against the other vendees; is not that correct?

A. That is true.

* * * * *

A. (Continuing.) And in addition to that, there were many instances where it was impossible to tell by whom the coal was imported. The Western Fuel Company made many purchases of 1,000 lbs. or 500 lbs., or of 10 tons, or of 20 tons,—in one instance, with the Pacific Coast Company, it was something over 18,000 tons, and it is impossible to tell the names of the vessels on which that coal was imported, or the out-turn weight of the particular vessel; it was absolutely necessary to assume that the invoice weight was the same as the out-turn weight. [257—203]

Q. So that in each one of these instances you simply set the out-turn figures down here as the actual weight; is that correct? A. Yes.

* * * * *

Mr. ROCHE.—The total shortage shown by the exhibit is 26,044 tons, 1965 lbs.; the total overage is 5324 tons, 1291 lbs.

Q. The actual shortage, Mr. Tidwell, of course,

(Testimony of W. H. Tidwell.)

would be the difference between the 5324 tons, 1291 lbs. overage, and 26,044 tons, 1965 lbs. shortage; is that correct?

A. Yes, sir; that is correct; that would also be the difference between the invoice weights and the ascertained weights.

(The document was here marked "U. S. Exhibit No. 125.")

MR. DUNNE.—Q. And thus your last statement contains a calculation of the net shortage; it is 20,720 tons out of a total of about 2,160,000 tons?

MR. ROCHE.—Now, may it please the Court, counsel seem to think it is necessary to repeat that at every turn.

THE COURT.—Yes. It does not seem to me to be at all necessary to repeat this every time it is mentioned, gentlemen.

[Testimony of Daniel J. Moynihan, for the Government.]

DANIEL J. MOYNIHAN, called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in San Francisco for a number of years. I am and have been for 18 years last past assistant weigher in the United States custom-house. I am and have been for a number of years familiar with the Folsom street bunker. I have had occasion from time to time during [258—204] the period that the Western Fuel Company has been engaged in business in San Francisco and in possession of the Folsom street bunker, to act as assistant

(Testimony of Daniel J. Moynihan.)

weigher of the custom-house in connection with the discharge of imported coal at that dock. I have frequently weighed coal upon the scales there. We used the rising beam in ascertaining this weight. That practice has been invariably followed by me, and it was the practice followed with reference to all weighing that went on under my observation there.

Q. Now, what do you mean by a rising beam?

A. Well, the beam when in the frame is locked, and you have to ascertain your weight—the beam wants to come from the bottom up and pass the center, as close to the center as possible, instead of from the top down.

* * * * *

Q. In what position is the beam when the coal is weighed by what is known as an even beam?

A. Well, they never weigh on an even beam.

Q. I understand that, but I want to know in what position the beam is when anything is weighed upon a scale with an even beam; the beam is horizontal, is it not? A. Yes.

Q. Well, you say that the coal was always weighed with what is known as a rising beam. About how far above the horizontal would the beam be when the coal would be weighed with what is known as a rising beam?

A. The beam is really never stationary when you are weighing; it is on the ascendancy and it comes past the center and is supposed to fall back as near the center of the beam as possible.

Q. Has it ever been your practice or the practice

(Testimony of Daniel J. Moynihan.)

of any United States weigher in weighing coal upon that dock upon what you understand to be and what you have testified to be a rising [259—205] beam, to weigh the coal only when the beam has reached the top or gets to the top of the scale? A. No.

Q. In weighing the coal upon what is known as a rising beam, how close to the horizontal is the beam?

A. It is supposed to be as near the center as possible when the weight is made; but it is practically moving in the course of weighing it all the time so quickly.

Two cars were weighed on the scales at a time at Folsom street. A tare weight would be taken of the cars at least once a day. These two cars would approximately weigh about 9,000 pounds. The gross weight of the cars and coal would be 20,000 pounds, approximately. The net weight of that coal would, therefore, be about five long tons, 2240 pounds to the ton.

Q. Are there any notches upon the beam or either one of the two beams contained upon the scales in the Folsom street dock scales?

A. The upper beam has notches, 500 lbs. and 1,000, as I remember, and the lower beam is indicated by 5 lbs. It has a sliding poise with no notches in it, just the marks in it.

Q. Well, in weighing this coal, of course, you practically have the poise, so far as the large beam is concerned already fixed that weighs simply every 500 lbs.? A. Yes.

* * * * *

Q. With what beam do you ordinarily do your

(Testimony of Daniel J. Moynihan.)

weighing, so far as the adjustment of the poise is concerned?

A. The upper beam you get your thousands, and for those under the thousand you take the fractional weight on the lower beam.

Q. You say that there are no notches upon the lower beam? A. No.

Q. How are the weights indicated upon the lower beam? [260—206]

A. Well, as a rule on the side there are indentations cut in, with the 5, 25 and 50 lbs., and the individual marks in between of 5 lbs. to 25 lbs. and so on.

Q. There is a mark indicating each 5 lbs. is that correct upon the smaller beam?

A. On the side, yes.

Q. And that side, of course, is presented to the view of the weigher? A. Yes.

Q. And the poise or what is known as the "P" is moved forward and backward for the purpose of getting the actual weight? A. Yes.

Q. In weighing this coal, before taking the weights, has the beam ever been horizontal? In other words, have you ever been obliged to move the "P" or poise backward in order to take the weight on the rising scale instead of having to wait for the beam to become even or horizontal?

A. Before starting in to weigh at all we balance the scale; that is, without anything on it, and we try to get the beam as near the center as possible in balancing it; that is, without anything on it, to show the scale is on an even balance, neither for or against.

(Testimony of Daniel J. Moynihan.)

Q. Now, I am asking you and talking about when you are actually weighing coal, of course, it becomes necessary for you, does it not, in weighing coal, to move this poise or "P" forward or backward upon the smaller beam? A. Yes.

Q. Now, has it sometimes happened that in moving to move the poise or "P" backward so as to take the weight upon the rising beam instead of taking the weight upon the horizontal or even beam?

* * * * *

A. We gently throw the poise over; the beam should be down, and [261—207] then we shift it back to allow it to rise.

Q. Now, how far back do you have to shift, or how far back has it been your practice to shift that "P" or poise in order to take the weight upon the rising beam?

A. Till it leaves the bottom gently; judging according to the weight—the judgment is there, you can see the beam, it is pretty hard to say.

Q. Now, has it sometimes happened that in moving or shifting this "P" or poise back the scale would come up from the bottom to a horizontal position?

A. Well, the beam is practically moving up and down; that is, you don't wait to have it come to a stop at a horizontal position.

Q. Do you continue to shift or move back the "P" or poise until the scale rises or starts ascending above the horizontal or even position?

A. You shift the poise until it leaves the bottom with the gentleness that you figure is practical, would

(Testimony of Daniel J. Moynihan.)

practically mean the center, if you gave it time to stop.

Q. That is, it would ultimately reach the horizontal if you gave it time to stop there; is that correct?

A. As a rule it would reach above the horizontal and come up to the center.

Q. Is that the position in which the beam is at the time the weight is taken?

A. That is, it has left the bottom and is varying between—

Q. (Intg.) The top and the bottom? A. Yes.

* * * * *

Q. Now, have you ever endeavored to shift this "P" or poise backward after the beam reached a horizontal position so as to take the weight upon a rising beam above the horizontal position? [262—208]

* * * * *

A. The rising beam above the horizontal position—no, sir.

Q. Did you ever at any time while weighing coal permit the beam when the weights were taken, to so rise that it would adhere to or rest against the top of the scale-beam or the beam-frame? A. No.

Q. Will you repeat again in your own language in what position the beam is at the time the weight is actually taken?

* * * * *

A. The beam has left the bottom of the frame and has started to ascend with practically a poise that would ultimately leave it close to the center as pos-

(Testimony of Daniel J. Moynihan.)

sible, although the beam is still moving when the weight is taken.

Cross-examination by Mr. STANLEY MOORE.

I belong to the department of the Surveyor of the port in the Custom-house of San Francisco. My duties during that time included the weighing of imported articles and merchandise generally as well as coal. There are, I believe, 24 assistant weighers in all. These weighers are shifted around from ship to ship and from wharf to wharf. This shifting is at the pleasure of the weigher, Mr. Dougherty (over whom the Surveyor of the Port has jurisdiction), so that I may be weighing coal on the Folsom street dock one day, and the next day I may be over on some other dock weighing something else. Two or three weighers may work on the same job at different times, that is, during the unloading of the same ship. The first thing we do in respect to the scales, when unloading a ship, is to balance the beam, so as to see that the scales are as nearly as possible correct. The tares of the cars are taken as often as the weigher thinks it necessary to check them, but at least once a day. [263—209] The cars are all iron. They vary in weight somewhat with the weather conditions. If it was raining, the fine coal would stick to the car. The state of the weather and of the coal has something to do with the frequency with which the tare weight is taken. The unloading of a ship goes on just the same in wet as well as any other weather. Four hatches are sometimes working on a vessel when she is discharging. They generally attempt

(Testimony of Daniel J. Moynihan.)

to work the four hatches at full operation in shore. I should imagine that one of those vessels working four hatches would discharge practically 30 to 40 tons per hour per hatch, or 160 tons in all per hour. The whole operation goes forward with considerable speed. The weighing of the two cars takes a very short time. It is done very quickly. As a rule, the beam is not still during the process of weighing. They do not wait for the beam to get steady before taking weight. When a car comes on the scales we adjust our 500 pound scale and carry the poise over so that the beam is down, and then I move my hand back, and when the beam commences to rise I take the weight. Then I clamp something down that arrests the whole proceeding.

Q. When you first begin the weighing, as I understand you, you carry the poise over until the beam is all the way down; is that correct? A. Yes.

Q. Now, do you know whether or not when you have that beam all of the way down on that scale that is weighing 20,000 lbs. at a time and commence to take it back, how many lbs. it takes, whether 5 or 10 or 20 or 30, to break the beam to cause it to rise, or 50—do you know?

A. No, I don't know. [264—210]

Q. You don't know? A. No.

Mr. MOORE.—It is suggested, or 100, but if the witness don't know it is no use of asking him.

The COURT.—You might as well run it up to a thousand.

Mr. STANLEY MOORE.—Q. At all events, Mr.

(Testimony of Daniel J. Moynihan.)

Moynihan, the process is that you first carry the poise over until the beam is clear down, and then you move that thing back with your hand until the beam breaks and rises; isn't that correct?

A. Till the beam rises to as close to attaining a final center as possible.

Q. You just illustrate with your hand the motion that you make after you have moved the poise over until the beam is clear down and when you start back, to break the beam and cause it to rise. Just illustrate with a movement of your hand how you do it and how rapidly you do it?

A. It is pretty hard; it is pretty hard to illustrate that without the beam and the tension to work against.

Q. I understand that, but isn't it a pretty quick movement when you bring your hand back and break the beam and cause it to rise?

A. In throwing it over to cause the beam to come down is a quick movement, but coming back is not—more carriage used in bringing the poise back.

Q. You pass your hand right steadily, do you not, as a general rule? A. You hit the poise slightly.

Q. Sir?

A. You touch the poise slightly till it starts in to move on the way back.

Q. And then you put over that clamp that arrests the whole proceeding, and take the reading, do you not? A. Yes.

Q. Who reads that off?

A. The weigher. [265—211]

(Testimony of Daniel J. Moynihan.)

Q. That is to say, if you are weighing there for the Government it would be made by you, the assistant weigher that was on the particular job? A. Yes.

When I am up there weighing at Folsom street a representative of the Western Fuel Company is present. The ship may have a representative there too, and the Australian ships usually are thus represented by a clerk. The Western Fuel Company's own ships, coming from the north, do not have a representative.

(Conceded by the prosecution that the type of scales used at the Folsom street docks are the Fairbanks-Morse.)

In the method of weighing the process is very quick, and the beam, after you begin the backward motion to cause it to rise, practically never becomes stationary before the weight is taken.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. What do you mean by practically not?

A. Well, you don't wait to have it actually stop, if you think you have ascertained the weight from the motion of the beam.

Q. In other words, the beam does not become perfectly stationary; that is what you mean, is it not?

A. Yes, sir.

Q. To what extent is that beam moving above and

(Testimony of Daniel J. Moynihan.)

below the horizontal at the time the weight is actually taken?

A. The beam in leaving the bottom is supposed to rise above the center and come back as near to the center as possible. [266—212]

Mr. ROCHE.—Q. That is, to come back as near to the center as possible; now, can you state through what distance the beam is moving the horizontal at the time the weight is taken?

A. Well, I don't know exactly.

Q. Have you any knowledge whatever as to the distance between the bottom of the scale-frame and the top of the scale-frame where the beam moves up and down?

A. Well, possibly 3 inches; I would not say exactly but it is in the neighborhood of 3 inches.

Q. Would that be between the position that the beam would be in at the time the beam was down and the greatest elevation which the beam could reach?

A. Yes, practically.

Q. About 3 inches? A. More or less.

Q. Has it ever occurred, in your experience as a weigher and while you were weighing coal, that at the time the coal would be weighed the beam would be resting up against the top of the frame?

A. No, sir.

* * * * *

Q. You say that just before you commence taking the weights the beam is down? A. Yes.

Q. And then you move the poise along so as to start the beam to rise? A. Yes.

(Testimony of Daniel J. Moynihan.)

Q. Does it frequently occur that you have to shift the poise or move it back again in order to take the weight?

A. Yes, at times you might move it too quick and it would rise too rapidly; then you would have to go over the operation again.

Q. You have testified upon cross-examination that these weights are taken very rapidly; irrespective of how rapidly the weights are taken do you always give yourself sufficient time to take accurate weights?

A. Yes. [267—213]

Recross-examination by Mr. STANLEY MOORE.

Q. Mr. Moynihan, you have been weighing here you say 18 years; during a large part of that time there was no Western Fuel Company?

A. No, sir.

Q. How long has it been the practice in this port to your knowledge to weigh such commodity as coal with a rising beam?

A. It has always been the custom.

Q. Ever since you have had anything to do down there on the water front? A. Yes, sir.

Mr. DUNNE.—Q. Do you always give yourself sufficient time to make exact weights when you are weighing coal?

A. What do you mean by exact weights?

Q. Well, I mean just exactly what the word "exact" means; I mean precisely correct to the lb.

A. We follow the custom in vogue of taking the weight with a rising beam; we do not wait for it to stop.

Q. Will you just answer my question, understand-

(Testimony of Daniel J. Moynihan.)

ing what the "exact" means; do you always give yourself sufficient time in weighing coal to get precisely exact weights? Now, you can answer that yes or no, I think.

A. Well, I will answer it by stating that we take it on the rising beam, the beam is never steady as a rule when we take the weights; now whether that is exact or not—I don't really know to what point you are getting.

Q. As an experienced weigher do you mean to say that a weight registered upon a rising beam is a precisely exact weight to the lb.?

A. We never weigh as close as a lb. Our weights are never recorded less than 10 lbs. That is, on a 10-lb., decimal.

Q. Why don't you wait in that process for precisely exact weights? [268—214]

A. Well, we are following a custom that is handed down to us under orders to weigh within 10 lbs.

Q. Well, in plain English, Mr. Moynihan, if you were to wait for precisely exact weights in weighing coal when you are unloading ships, you could not do business, could you—the world has to move on, has it not?

Mr. McCUTCHEON.—There is no answer to that.

Mr. DUNNE.—I don't think it requires an answer.

Further Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. Mr. Dunne has asked you how close to an absolutely accurate weight you weigh the coal at the time the coal is weighed: I will ask you this question, in your judgment as a weigher, having

(Testimony of Daniel J. Moynihan.)

18 years experience, how close to the actual weight of the coal is the coal weighed when it is weighed by you upon a rising beam?

* * * * *

A. We try to get it within the decimal of 10 lbs. over and under 5 lbs.

Mr. ROCHE.—Q. 10 lbs. over and under 5 lbs.; so that, in your judgment as an experienced weigher, the actual weight of coal would be within 10 lbs. of the weight taken upon a rising beam?

Mr. STANLEY MOORE.—That is objected to as calling for the conclusion of the witness and as not necessarily following from his other testimony.

The COURT.—The objection is overruled.

Mr. STANLEY MOORE.—We note an exception.

A. Yes.

Mr. ROCHE.—Q. And that is 10 lbs. in how much net weight of coal? [269—215]

The COURT.—About 5 long tons.

Mr. ROCHE.—Your Honor is correct in that statement.

Further Cross-examination by Mr. STANLEY MOORE.

Q. Is it not a fact that as an experienced weigher with a good deal of practice in weighing with these rising beams, you first take your poise here until the beam is clear down; that is correct, is it not?

A. Yes, sir.

Q. Then is it not a fact that generally as a practiced weigher you carry that poise back and when that beam commences to rise you take your weight—

(Testimony of Daniel J. Moynihan.)

generally? A. Yes.

Q. Now, you don't know whether it takes 10 lbs. or 20 lbs. or 30 lbs. or 50 lbs. on those scales weighing 20,000 lbs. at a time to cause that beam to rise up when it is down, do you?

A. You are working on a beam of 500 lbs. with 5 lb. divisions, and you can tell pretty close.

Q. Well, I say no matter whether you are working on a beam of 5 lbs. or of 500 lbs. divisions, when your beams are down, and you are weighing 20,000 lbs., do you know what it takes to make those beams rise up and break, no matter whether it is graduated off into 5 lbs. or 10 lbs. or one lb.?

A. We can tell within practically the 10 lbs. or so by moving that poise two notches, 10 or 20 lbs. We can tell how it rises what action there will be.

Q. But I am talking about causing the beams to rise when they are clear down and there are 20,000 lbs. upon the scales; I ask you if it is not a fact that generally in weighing there, as an experienced weigher with a good deal of practice, that you did not carry back either one of those poises—back or forward very much, but you would have it back until the point was reached when the beam would commence to rise and then you [270—216] would take your weight; now, is not that the way that it was done?

A. Yes, sir.

[Testimony of W. H. Tidwell, for the Government.]

W. H. TIDWELL, being recalled for the United States, continued his testimony as follows:

Direct Examination by Mr. ROCHE.

I think I have been on the Folsom street bunkers five times. The first time I actually ascended the superstructure occurred shortly after the return of the first indictment. I think I have been on top of the bunkers four times in all. There was one visit when I did not go up. On the occasion of my first visit I spent about an hour on the top of the bunkers. That occasion was prior to the taking of photographs by Mr. Selvage. On this occasion of my visit, they were not discharging a vessel. I have, however, been on the bunkers when a vessel was discharging. I have visited the scales-house on the dock. I have looked in an easterly direction from the window in that scales-house for the purpose of ascertaining what could be seen through that window. I have done that at a time when coal was being weighed in the scales-house. I am familiar with the system pursued by the Western Fuel Company in discharging coal from ship to hoppers, and from hoppers to coal cars and in bringing said coal upon the scales and weighing it. On the occasion that I have referred to, when I was in the scales-house when they were discharging a vessel, the first hopper was 40 or 50 feet from the scales-house. I do not recall whether coal was then actually [271—217] being discharged through the chute from the bottom of the first hopper into the cars, but coal was actually being

(Testimony of W. H. Tidwell.)

discharged from several towers at that particular time. I could see practically nothing except probably the bottom of the cars, or the wheels of the cars under the first tower. So far as the chutes were concerned, it was impossible to see them from the scales-house. The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. He was facing west, with the beam of the scales in front of him, and with his back toward the hopper and the bunker. As I remember it, speaking of the time when a ship was being discharged, the entire inshore bunker under which the north track passes was entirely open, in respect to the space between the two tracks. There was a beam on which rested the hopper, and on the both sides of this beam everything was open. The second track was also open. I mean by the second track the middle track. The third track, and I believe also part of second or middle track on the west side of the bunkers, were covered over partially. There was also a covering on the south side of the third track. There were a number of movable planks there, which were standing up against the south wall of the bunkers, which had not been put in place.

Mr. ROCHE.—May it please the Court, I understand that for the purpose of the record, the three exhibits or tables to which the witness' attention was called last Friday, have been marked United States Exhibit No. 125, Tables A, B and C?

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—But only one has been thus far offered. [272—218]

Mr. ROCHE.—Yes, but I will introduce the others in just a moment.

Q. The exhibit to which your attention was directed on Friday afternoon last, Mr. Tidwell, just before court adjourned, was called by me Exhibit "A," but it has been written into the record as Table A of United States Exhibit No. 125; so that we may make the connection between this and the other exhibits, will you just state again very briefly what this exhibit contains and what it shows?

A. That is a statement showing all coal received, showing a statement of the invoice weights, the entry number, the name of the ship, the invoice weight, the ascertained weight, the shortage and the overs of all coal received by the Western Fuel Company from the first day of April, 1906, to and including the 31st day of December, 1912; and it also includes the amount on hand on April 1, 1906.

Q. It does show, does it not, Mr. Tidwell, each instance where there has been an overage between the invoice or bill of lading weight and the out-turn or discharge weight, as well as the shortage?

A. It does.

Q. Something has been said here about percentages. Did you calculate the general percentage of the shortage, taking into consideration every pound of coal received by the Western Fuel Company from every source between the first day of April, 1906, and the 31st day of December, 1912, and both of those

(Testimony of W. H. Tidwell.)

dates inclusive; and likewise including the partial cargoes of coal to which you testified the other day, and which you figured up on what is known as the out-turn weight? A. I did.

Q. What was your percentage, with all of these elements included?

A. With all the elements included, it was a little less than one per cent. [273—219]

Q. Did you also take into consideration, for the purpose of ascertaining the percentage of shortage, the weight of all the coal shown in Table A, Exhibit 125, after eliminating or deducting therefrom these partial cargoes to which you have referred, which you had estimated at the out-turn or discharge weight? A. I did.

Q. Now, as I recall your testimony on Friday afternoon, Mr. Tidwell, you said that you likewise took into consideration coal which was purchased by the Western Fuel Company already discharged, and that you figured that at the actual weight given you?

A. Yes.

Q. In figuring the last percentage to which I have directed your attention in your calculation, you said you did eliminate these partial cargoes; did you also eliminate the coal thus purchased by the Western Fuel Company, the actual weight of which was given you by its representatives?

A. I don't know that I fully catch your question.

Q. Let me put the question to you in this way: For the purpose of ascertaining the percentage of shortage of full cargoes discharged at San Francisco de-

(Testimony of W. H. Tidwell.)

livered to the Western Fuel Company, did you make a calculation from which you eliminated these partial cargoes to which you have referred, and also the coal purchased locally by the Western Fuel Company?

A. I did.

Q. Now, I direct your attention to a sheet of paper which has been marked, and I ask you whether that sheet of paper shows that calculation? A. It does.

Q. Just explain, if you will, the calculation which is disclosed upon the sheet of paper which I have just handed you. That is in your handwriting, is it not, Mr. Tidwell? [274—220]

A. No, it is in the handwriting of Mr. E. M. Atkinson; it was prepared, though, under my direction.

Q. While counsel are looking at that statement, Mr. Tidwell, will you again explain, please, the reason why you had to take these partial cargoes at the out-turn weight, so far as that portion of the cargoes were concerned which were actually turned over to the Western Fuel Company.

A. For the reason that it was absolutely impossible to obtain the out-turn weights of those cargoes. As I stated the other day, to illustrate it, the Western Fuel Company would purchase in some instances 1000 pounds and it was absolutely impossible to determine when that coal had been imported, or in what vessel it had been imported, and so forth; in other instances, it purchased from the Pacific Coast Coal Company over eighteen thousand tons of coal; it would be practically impossible—or it would be impossible—to determine the out-turn of all of the

(Testimony of W. H. Tidwell.)

cargoes which represented that coal.

The COURT.—Q. You said 1000 pounds a moment ago.

A. Yes, sir.

Q. And you meant 1000 pounds, did you.

A. Yes, sir. There were sometimes purchases made of 500 pounds. There are very small amounts on the coal statement for a given month, coal which we purchased from some of the local dealers here.

Mr. ROCHE.—Q. And so far as a particular cargo is concerned, one-half of which or a portion of which was delivered to the Western Fuel Company and the remaining portion delivered to some other person, of course where a shortage occurred, it would be impossible to tell where that shortage existed, would it not?

A. As a matter of fact, we would not know at what time the particular coal was imported, or the vessel it came in, or anything like that. [275—221]

Q. Directing your attention to the statement which has just been shown to counsel for the defendants, I will ask you, Mr. Tidwell, to explain that calculation to the jury?

A. This statement represents the total amount of coal imported—not imported, but received, and on hand April 1, 1906, to December 31, 1912, amounting to 2,159,551 tons, 1147 pounds, from which has been deducted—

Q. Just a moment: That represents the total coal accounted for in Table A of United States Exhibit No. 125; is that correct?

(Testimony of W. H. Tidwell.)

A. Yes, sir, that is correct; from which was deducted 232,990 tons 519 pounds, which represents the partial cargoes which had been purchased by the Western Fuel Company, purchased or obtained by the Western Fuel Company, leaving a balance of 1,926,-561 tons 548 pounds, on which there was a difference upon its receipt at this port, either a shortage or an overage.

Q. Just let me ask you one other question before you finish that calculation: The second figure which you gave us, and which you said represented partial cargoes of coal received by the Western Fuel Company, also includes coal purchased locally by the Western Fuel Company in small quantities, including from the Pacific Coast Coal Company?

A. Yes, sir, and the amount on hand on the first of April, 1906.

Q. And that weight, you took as absolutely correct?

A. Yes. The difference between these two amounts, the percentage amounts to 1.07 per cent.

Q. That is the percentage of shortage?

A. The percentage of net shortage.

Q. What did you say it was? A. 1.07 per cent.

A. And that calculation is based upon all of the imported [276—222] directly by the Western Fuel Company, between the two dates already referred to by you, taking into consideration the overages; is that correct?

A. Yes. I would like to state in connection with this, that there are many cargoes of coal, the percentage of which is considerably more than is shown by this statement; I recall one in particular, the

(Testimony of W. H. Tidwell.)

steamer "Dumbarton," she had on board, I think, four thousand and some odd tons, and she was short 409 tons, which was about nine or ten per cent.

Mr. McCUTCHEON.—What date was that?

Mr. ROCHE.—That was in 1905.

Mr. McCUTCHEON.—That is not within the period covered by this statement, is it?

Mr. ROCHE.—No.

Mr. McCUTCHEON.—Then why is the witness volunteering that? He has not been asked anything about it.

Mr. ROCHE.—Q. That date is correct, is it, Mr. Tidwell?

A. Yes.

Q. We will go into that when we have these exhibits.

A. I might say, though, that there are many within that statement which I cannot recall at the present time, which would represent anywhere from $2\frac{1}{2}$ to 5 per cent shortages.

Q. Now, as I understand your testimony, Mr. Tidwell, while this does eliminate partial cargoes, and the coal on hand on April 1, 1906, and the coal purchased in small quantities locally by the Western Fuel Company, it does include each cargo of coal upon which there was an overage, that is, upon which or as the result of the discharge of which, more coal was received by the Western Fuel Company than was shown by the bill of lading or the invoice; is that correct? A. Yes, sir, that is correct.

Q. Have you also made any calculation in which

(Testimony of W. H. Tidwell.)

was included those cargoes alone upon which there was a shortage? A. I have not. [277—223]

Q. Will you kindly make that calculation sometime today, please, so that we may have that calculation before the jury? A. Yes.

Mr. ROCHE.—We offer this table in evidence; I suppose there is no objection to it.

Mr. McCUTCHEON.—I think not.

The WITNESS.—I would like to have it typewritten.

Mr. STANLEY MOORE.—Just a slight discrepancy between that and our figures; we figure it at 1.06 and he has it at 1.07.

Mr. ROCHE.—We will have this statement typewritten and the typewritten copy substituted for this copy. We will ask to have it marked United States Exhibit No. 125, Table D.

(Paper was marked U. S. Exhibit No. 125, Table D, and reads as follows:)

[U. S. Exhibit No. 125, Table D—Statement Showing Percentage of Shortage in Coal, etc.]

TABLE D.

“Statement Showing Percentage of Shortage in Coal Imported Into the United States by the Western Fuel Company from April 1, 1906, to December 31, 1912.

Invoice Weight as per

Summary 2,159,551—1147

Deduct sum of Out-right Purchases, in which Invoice Weight is stated as the same as ascertained weight

232,990— 599

Invoice Weight of

Imports 1,926,561— 548

Shortage as per sum-

mary 26,044—1965

Overage as per sum-

mary 5,324—1291

20,720— 674

Percentage of net Shortage

1 7/100

[Endorsed]: Table D. No. 5233 U. S. v. Howard et al. U. S. Exhibit No. 125. Francis Krull, Deputy Clerk.”

(Testimony of W. H. Tidwell.)

Q. Have you also prepared a calculation showing the total quantity of coal sold by the Western Fuel Company between April 1, [278—224] 1906, and December 31, 1912?

A. I have. The statement also includes the amount of coal on hand and the amount burned during that period.

Q. That is, it also includes the quantity of coal on hand on the 31st of December, 1912? A. Yes, sir.

Q. From what papers, documents and records of the Western Fuel Company was that calculation made?

A. It was first prepared from a statement which was prepared and handed me by Mr. Norcross, the secretary of the Western Fuel Company and afterwards checked by the monthly statement of coal sales at Oakland and San Francisco.

Q. And which monthly sales have already been introduced in evidence, and are now in evidence in this case? A. Yes, sir.

Q. You say that this calculation likewise includes some coal which was burned; where was that coal located and when did it burn, if you know?

A. I don't know where it was located, but I think it was burned in October, 1908.

Mr. ROCHE.—You will concede, gentlemen, that it was in October, 1908, will you not?

Mr. McCUTCHEON.—Yes, subject to correction.

Mr. ROCHE.—Q. In other words, there was no coal belonging to the Western Fuel Company that was burned in the conflagration of 1906, so far as

(Testimony of W. H. Tidwell.)
your knowledge goes?

A. No, sir, so far as I know.

Q. I direct your attention to what is designated Table B, and ask you if this exhibit contains the calculations to which you have already testified?

A. It does.

Q. And it shows the sales of coal for each year?

A. It shows the sales of coal for each month throughout the year.

Q. And also for each year?

A. The totals are given for each year throughout the period mentioned. [279—225]

Mr. McCUTCHEON.—Mr. Roche, the witness stated it showed sales at Oakland and at San Francisco; I suppose he means, really that it is intended to show all sales.

The WITNESS.—As shown by the records, the monthly statements of the Western Fuel Company of its Oakland and San Francisco depots.

Mr. ROCHE.—Q. In other words, all coal sold by the Western Fuel Company within that period was charged against either the San Francisco office or the Oakland office? A. Yes, sir.

Mr. McCUTCHEON.—Then this is intended to show all of the sales.

Mr. ROCHE.—Yes, that is correct.

The WITNESS.—But not at the mines.

Mr. McCUTCHEON.—Q. Well, all coal imported into California. A. Yes.

Mr. ROCHE.—Q. This statement shows that there were sold by the Western Fuel Company, be-

(Testimony of W. H. Tidwell.)

tween the two dates to which you have referred, 2,196,215 tons, 1847 pounds of foreign coal; that is correct, is it not? A. That is correct.

Q. In other words, this statement relates exclusively to foreign coal, and does not take in consideration the domestic coal?

A. Entirely; all figures prepared by me relate exclusively to foreign coal; none relate to domestic coal whatever.

Q. It also shows that during the fire of October, 1908, there were 326 tons of coal destroyed, that is, 326 tons of foreign coal? A. Yes, sir.

Q. And it shows a balance on hand as of December 31, 1912, of 4,286 tons, the amount of foreign coal on hand at that date was ascertained by you from the records of the Western Fuel Company—is that correct, from the inventory?

A. It was ascertained from Secretary Norcross; a written memorandum [280—226] was given me to that effect, which I have in my suitcase.

Q. So that this table B discloses that between April 1, 1906, and the 31st day of December, 1912, both of those dates inclusive, the Western Fuel Company sold 2,196,215 tons, 1847 pounds of coal?

A. That is correct.

Mr. ROCHE.—We offer this table in evidence; this will be marked Table B of U. S. Exhibit No. 125.

* * * * *

Mr. ROCHE.—Q. Did you make any calculation between the amount of coal actually received by the Western Fuel Company during the period to which

(Testimony of W. H. Tidwell.)

your attention has been directed, including the coal on hand on the first day of April, 1906, and the total sales of foreign coal between those two dates, including the coal on hand on the 31st day of December, 1912, plus the amount of coal burned during the month of October, 1908?

A. I prepared no specific statement on that, but in deducting the amount of coal received from the amount sold it equals—I can not recall the exact figure, but approximately 62,000 tons.

Q. In other words, the Western Fuel Company sold some 62,000 tons more foreign coal during the period of time to which you have referred than its records show it actually received?

A. That is true.

Q. Of course, that includes the coal on hand on the 31st of December, 1912? A. Yes, sir.

In the course of my investigations, as above outlined, I had occasion to examine the day-books or diaries kept by the defendant Mills. I am familiar with the contents of those books in a general way, and with the system of bookkeeping pursued therein. I have compared the entries in those books with the invoice and bills of lading of the cargoes to which the entries refer, and I have also compared the entries in those books [281—227] with the discharge or out-turn weight of foreign coals imported by the Western Fuel Company into this country. I have made a comparison between the figures contained in the Mills books and the drawback claims made against the United States for the re-

(Testimony of W. H. Tidwell.)

turn of import duties.

I have prepared a table showing the quantity of coal discharged from time to time upon barges, either under the control of or operated by the Western Fuel Company or the Western Transport Company, from the offshore bunker of the Folsom Street dock and afterwards laden on vessels. In preparing this table I have taken into consideration the books kept by the defendant Mills. Indeed, the statement was prepared from those books wholly. I made a comparison between the drawback entries or claims against the United States Government and the books of the defendant Mills, and found that they tallied.

Q. Did you also make a comparison between the records kept by the Western Fuel Company, as to the quantity of coal deposited from time to time in certain compartments or pockets of the offshore bunker and the quantity of coal laden upon barges from those compartments or pockets? * * *

A. I made an examination as to one, only, which was placed in evidence on Friday.

* * * * *

Q. Did you also make a comparison between the figures kept in the books of the defendant, Mills, and certain other records of the company for the purpose of ascertaining whether they tallied, so far as the quantity of coal which Mills' books disclose was taken by those barges from time to time out of the compartments or pockets of the offshore bunker?

* * * * *

(Testimony of W. H. Tidwell.)

A. I think that I referred to that a few moments ago; I only saw one of those statements; I only had one in my possession. It was placed in evidence on Friday, showing you how much coal had been discharged from, I think it was the steamer "Titania," and placed into various barges and compartments, which was also testified to by Mr. Hahn; I think that is the only one I saw, of that particular character of statement.

Mr. ROCHE.—Q. Do you recall whether the figures in that exhibit tallied with that transaction, so far as the defendant Mills' books were concerned, in which entries were made regarding that transaction? A. Yes, sir.

Q. State to the jury the system that was pursued by the defendant, Mills, in keeping this diary?
* * *

Q. I direct your attention to the diary of 1906. Will you turn to the month of April, in that diary, and look at the entries which first appear in that diary after the first of April, 1906?

* * * * *

Q. Will you explain to the jury, Mr. Tidwell, the system pursued by the defendant, Mills?

A. April 1st was Sunday, consequently April 1st does not appear, it is April 2d.

Q. Will you explain to the jury the system pursued by the defendant, Mills, in making those entries and keeping those books?

* * * * *

A. If I may, I will answer that first by asking a

(Testimony of W. H. Tidwell.)

question: Do you refer to incoming cargoes or barges?

Mr. ROCHE.—Q. I intended that you should answer with reference to both.

A. As to incoming cargoes, the book shows the amount of coal which has been discharged from day to day, the place or receptacle where it has been discharged; for instance, on April 2d, 1906, the steamer "Reidar" was being discharged; on this particular day [283—229] 324 tons, 520 pounds were placed in the wharf bunker; 76 tons, 960 pounds in the wharf bunkers, with the letters "G F" on the side, with which I am not familiar. 2418 tons, 315 pounds were placed in the yard bunkers; 192 tons, 910 pounds in the offshore bunkers; 1504 tons, 810 pounds in the yard; 566 tons, 700 pounds in the barge "Comanche"; 422 tons, 370 pounds in the—it seems to be "Oriental," I don't know just what that refers to. 307 tons, 340 pounds were placed on the brig "Bonanza," making a total discharge out of this ship of 5,811 tons, 210 pounds. This was not the first date of discharge of this vessel.

Q. Was that the last date of discharge of the vessel, according to these books?

A. It seems to be the last date of discharge of the vessel.

Q. Let me ask you this question with reference to these entries generally; the defendant, Mills, kept in that book, did he not, entries showing the quantity of coal discharged from these importing vessels each day? A. Yes, sir.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

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VOLUME II.

(Pages 321 to 736, Inclusive.)

Upon Writ of Error to the United States District Court of the
Northern District of California, First Division.

Filed

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F. D. Monckton,

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(Testimony of W. H. Tidwell.)

Q. That is correct, is it not?

A. The bunker, or barge, or wherever it was placed.

Q. In other words, these day-books would also show the various place or places into which this coal would be placed, thus discharged from these ships or vessels? A. That is true.

Q. And that system was pursued each day until the cargo was entirely discharged? A. Yes, sir.

Q. And the entries if any were kept by the defendant Mills as to what ultimately was done with that coal or with that part of the cargo which was discharged into the compartments or pockets of the offshore bunker?

A. On the same page, same date, appears the name of the barge [284—230] “Ludlow” with some other letters which I do not understand the meaning of. And under the name of the “Terge Viking,” which was an imported vessel, Voyage 7, I believe it is—she received 607 tons, 1100 lbs.; on account of the steamer “Titania,” 939 tons, 440 lbs. Account of offshore bunker, 100 tons, 290 lbs., making the total amount received into the barge of 1646 tons, 1830 lbs. “Ventura,” 199 tons, 1556 lbs. The “Sesostris,” 150 tons, 848 lbs. The “Cambrian King,” 700 tons, 1147 lbs. The steamship “Siberia,” 662 tons, 940 lbs., a total of 1713 tons, 11 lbs., or over 66 tons, 421 lbs.

Q. In other words, that record upon its face shows that there was discharged from this barge some 66 tons of coal more than she took on.

(Testimony of W. H. Tidwell.)

A. More than she had on board, yes.

Q. More than she had on board? A. Yes.

Q. It is a fact, is it not, Mr. Tidwell, that in those books every pound of coal that finds its way into the barge is traced and found to be discharged?

A. Yes.

Q. As well as some 66 tons more?

A. Every pound that went into the barge is shown by the record. If it was taken from the yard, as I can find an instance here where coal was taken from the yard and placed into the barge—there does not seem to be one at the present time, but it will show the amount taken from the yard or any other place, both tons and pounds, tracing it down to 40 or 100 pounds.

Q. Now, I notice that you said a moment ago or that you indicated a few minutes ago that the number of the voyage of a particular boat was designated in that book. A. Yes.

Q. Do you recognize to what those figures relate?

A. The number of the voyage of the ship.

Q. The number of the voyage of the ship; and the number of [285—231] the voyage of the ship is indicated opposite the ship; isn't that true, in that book? A. Yes.

Q. So as to show upon what particular voyage the coal was discharged, which finally found its way into the barge; is that correct? A. Yes.

Q. Now, as I understand your testimony, Mr. Tidwell, if 5,000 tons of foreign coal were taken off a given ship, in this book is shown the quantity of coal

(Testimony of W. H. Tidwell.)

taken out of that boat each day, and the various points to which that coal would be distributed; is that correct? A. That is true.

Q. And that would follow along each day until the entire cargo of this imported coal would have been discharged from the ship.

A. That is true, and it would either show a shortage or an overage, as the case might be.

Q. In this book is also set down, so far as the importation of coal is concerned the invoice or bill of lading weight; is that correct?

A. It shows—no, it shows the amount which was discharged each day, and it ends with a statement either short or over, as I remember.

Q. And the shortage or overage is the difference between the out-turn weight and the invoice or bill of lading weight; is that correct? A. That is true.

Q. In other words, if the amount of coal discharged from the ship as shown by this book is 1,000 tons in excess of the invoice or bill of lading weight, the entry that is made in this book is over so many tons; is that correct?

A. Over 1000 tons or short 500 tons, as the case may be.

Q. If on the other hand the out-turn weight is less than the bill of lading or invoice weight, this book shows shortage so many tons or under so many tons?

A. That is true. [286—232]

Q. Now, then, this book shows also, does it not, Mr. Tidwell, the amount of foreign coal or imported coal laden from time to time in these barges?

(Testimony of W. H. Tidwell.)

A. It does.

Q. And also shows the coal taken out of these barges and placed upon other vessels.

A. It does.

Q. Including coal laden upon American registered vessels foreign bound for fuel purposes, upon which subsequently drawback claims were made; is that true? A. That is true.

Q. Now, I notice that in this book, so far as the discharge of barges is concerned appears quite frequently the words "over so many tons"; will you describe what is meant by entries similar in kind to that made in this book so far as the barges are concerned?

A. It refers to the amount which has been checked out of the barge more than went in it. For instance, to illustrate it, if a barge received 1000 tons of coal and they took out 1100 tons of coal, they would put down under the amount "100 tons over," or showing the difference between the amount that entered the barge and the amount which was subsequently removed.

Q. Now, let me take a concrete case for the purpose of illustration: If a vessel is being discharged containing imported coal and 1,000 tons of this coal is deposited into the compartments of the offshore bunker, this book would show that fact, would it not? A. Being discharged from a vessel.

Q. Yes. A. Yes.

Q. And would show that 1000 tons of that imported coal was finally deposited in the compart-

(Testimony of W. H. Tidwell.)

ments of the offshore bunker; that is true, is it not?

A. That is true.

Q. Now, then, if it was desired to place that coal upon an American registered vessel foreign bound, the 1000 tons of [287—233] coal would be discharged from the offshore bunker into the barge and this book would record that fact too, would it not?

A. It would.

Q. Now, the book would also—

A. (Intg.) Let me get the full significance of that question. You mean that book would show that coal was taken from the offshore bunker into the barge?

Q. Yes. A. Yes.

Q. And using the 1000 tons for the purpose of illustration, if there were 1000 tons deposited in that offshore bunker and the barge took that 1000 tons for the purpose of coaling some other vessel with it, this book would record that fact? A. It would.

Mr. STANLEY MOORE.—It would not record the fact that it had taken the 1000 tons that came from that vessel?

Mr. ROCHE.—Certainly.

Mr. STANLEY MOORE.—Ask the witness the question.

Mr. ROCHE.—Q. It would record the fact, would it not, that the 1000 tons in the offshore bunker would be laden from that offshore bunker into the barge? A. Into the barge.

The COURT.—I am assuming we are dealing only with 1000 tons of coal in the offshore bunker and

(Testimony of W. H. Tidwell.)

there has been nothing more put there.

Mr. MOORE.—Yes, that was the point of my objection. It appeared to me that he was trying to convey the impression to the jury that the book would show that 1000 tons had gone into the barge, which is not the fact.

The WITNESS.—If I am permitted to explain that, I think that I can, in the due course of time the Western Fuel Company would make an affidavit to the fact that that coal did come off a particular vessel and claim a drawback on it. [288—234]

Mr. MOORE.—We are talking about these books, now, Mr. Tidwell, and your testimony is supposed to be confined to that. We will come to this other matter further on in the testimony.

Mr. TIDWELL.—I was merely answering your question.

Mr. MOORE.—I was talking about the book and just trying to satisfy the jury, because I think a mistaken inference might arise from your testimony. You don't mean to testify that if 1000 tons came off a vessel into the offshore bunkers and that 1000 tons subsequently was loaded into a barge, that that book would show it was that 1000 tons. I think that your testimony was creating that impression with respect to that book.

* * * * *

Mr. ROCHE.—Q. It is a fact, is it not, for every pound of coal that this book shows was deposited from time to time in the offshore bunker, the book itself shows the particular boat from which that coal

(Testimony of W. H. Tidwell.)

was discharged; is that correct? A. Yes.

Q. In other words, if there was no coal at all in the offshore bunker, and 1000 tons of coal was taken off a particular boat and deposited in the offshore bunker this book would show the name of the boat from which that coal was discharged, would it not?

A. Yes, and the day on which it was placed there.

Q. And likewise the date upon which it was discharged from a particular boat? A. Yes.

Q. Now, using the 1000 tons still for the purpose of illustration, the weight of the coal or rather—I will withdraw that question and put it in this form: If 1000 tons of coal is [289—235] shown by this book to have been taken out of the offshore bunker and laden upon a barge, that 1000 tons represents the out-turn weight, does it not?

A. The out-turn weight of what?

Q. The out-turn weight of the coal discharged from the boat, from the importing vessel.

A. From that ship, yes.

Mr. STANLEY MOORE.—From the boat.

Mr. ROCHE.—Q. From the importing boat or boats, as the case may be; and upon that weight it is that duties are paid the United States Government.

A. That is true.

Q. And it is upon that weight that the duty was in fact paid to the United States Government; is that correct? A. That is so.

Q. Now, then, that 1000 tons would be carried by the barge over to one vessel, in the event that the entire 1000 tons was to be placed upon one vessel; is

(Testimony of W. H. Tidwell.)

that correct? A. Yes.

Q. And if that 1000 tons was being laden upon an American registered vessel, foreign bound, the weight of the coal at the point of discharge from the barge into the vessel would indicate the weight upon which the drawback claim would be based; isn't that true?

A. That is true. That amount of coal discharged from the barge even though it would be 1100 tons, to continue the illustration, would be sent by Mr. Mills to the office of the Western Fuel Company and we will say the steamship "Manchuria" would be charged with that amount and in due course of time the Pacific Mail Steamship would claim a drawback.

Mr. McCUTCHEN.—Q. Is that all from this book? Is that in explanation of this book, all of it?

Mr. ROCHE.—It is an explanation, although it all does not appear in the book. In other words, a drawback of [290—236] course does not appear in this book.

Q. Let me ask you this question, Mr. Tidwell. In a case such as that, assuming that the 1000 tons of coal when discharged into the American registered vessel, foreign bound, amounted to 1100 tons, the drawback claim would be based upon 1100 tons, and the duty would be refunded by the United States Government upon 1100 tons; is that not correct?

A. That is true.

Q. And it is also a fact, is it not, that in practically 99 per cent of the cases instances in this day-book kept by the defendant Mills, so far as the barges were concerned, there was always an overage?

(Testimony of W. H. Tidwell.)

A. Practically in every instance; there were a few shortages through the six or seven years.

Q. Let me ask you this question too;—a considerable quantity of this coal discharged first to the offshore bunker or into the compartments of the offshore bunker and afterwards laden upon these barges found its way into United States transports?

A. It did.

Q. That is correct, is it not?

A. That is, according to the records.

Q. According to the records? A. Yes.

Q. Now, have you compared the weight of the coal as that coal was weighed from the barge into the United States transports with the weight of the coal as the coal was discharged from the offshore bunker into the barge?

A. In other words, have I compared the weights checked into the transports by the amount which the barge had received? A. Yes.

Q. Do those records show that the weight of the coal deposited in the transport exceeded the weight of the coal as it was [291—237] checked into the barge? A. In almost every instance.

Q. An overage, is that correct?

A. An overage, yes.

Q. Is the same true with reference to some other boats owned by the United States and which were coaled by the Western Fuel Company from time to time? A. Revenue cutters, yes.

Q. Revenue cutters? A. Yes.

Q. It is a fact, is it not, Mr. Tidwell, that all of

(Testimony of W. H. Tidwell.)

these boats would ordinarily be coaled by means of these barges? A. Yes.

Q. In other words, the coal would first be laden upon the barge and afterwards from the barge discharged into the vessel? A. Yes.

* * * * *

Mr. ROCHE.—Q. Of course, you have examined, have you not, these claims made from time to time based upon affidavits of the defendants, James B. Smith and other officials of the Western Fuel Company upon which the United States Government paid back some of these import duties? A. I have.

Q. And the large majority of those claims were preferred by the Pacific Mail Steamship Company, were they not? A. That is so.

Q. Based upon coal laden for fuel purposes into its various steamships, the names of which were called to the attention of the witness Dickson.

Q. I direct your attention to a table which is entitled Exhibit "C," and which for the purpose of identification I will have marked "U. S. Exhibit 125, Table C," and ask you if that table was prepared by you?

A. It was prepared under my direction. [292—
238]

Q. And were the figures subsequently checked by you? A. They were.

Q. So that those figures are in your judgment accurate and correct; is that so? A. Yes, I think so.

Q. I would like to have you explain to the jury, if you will, what that exhibit represents. * * *

(Testimony of W. H. Tidwell.)

A. This exhibit represents the amount of coal which was laden into barges of the Western Fuel Company, showing the vessel or yard or compartment from which it was received, the vessel on which the coal was discharged, the total amount which was discharged from the vessel, the overage, the amount for which no drawback was claimed, and also the amount for which drawback was claimed and paid, and also shows the amount which was laden upon army transports and revenue cutters.

Q. Does it show the name of the boats upon which the coal was imported? A. Yes.

Q. As taken from the records of the Western Fuel Company.

A. As taken from the records of the Western Fuel Company—well, in fact this is all taken from the records of the Western Fuel Company kept by Mr. Mills.

Q. And it shows the weight of coal as it was checked upon the barge; is that correct? A. Yes.

Q. That weight being the weight upon which the Western Fuel Company paid duties to the United States Government? A. Yes.

Q. And it shows the weight of the coal as it was checked out of the barge into the particular vessel into which the coal was laden? A. Yes.

Q. It is true, is it not, that it is upon that weight that these drawback claims were made and upon which the drawback claims were paid?

A. That is true.

Mr. ROCHE.—Will you admit, Mr. McCutchen,

(Testimony of W. H. Tidwell.)

that these [293—239] small sheets show the daily report of discharge of the Wellington coal from the steamship "Thor," and the final sheet represents a summary of the total coal discharged from her and destination?

Mr. McCUTCHEON.—I suppose all we can admit is that these statements were rendered to the Western Fuel Company by Mr. Meyer whose name is signed here as weigher.

Mr. ROCHE.—All right. I want to have this marked as an exhibit for the purpose of having the witness make a comparison with the books of Mr. Mills.

Mr. McCUTCHEON.—No objection.

Mr. ROCHE.—Mark this as U. S. Exhibit 126. We offer this as evidence; I do not suppose there will be any objection, so that I may use it hereafter. Mark it 126.

(The document was here marked "U. S. Exhibit No. 126.")

Q. The book which I hand you, Mr. Tidwell, purports to be the diary kept by the defendant Mills, does it not, for the year 1911? A. Yes.

Q. And so far as the entries are concerned, they are similar in kind to the entries made in the diary for 1906 to which your attention has heretofore been called? A. That is true.

Q. I direct your attention to "U. S. Exhibit No. 126," which purports to be first a daily report showing the discharge of the steamship "Thor" or New Wellington coal and the destination.

(Testimony of W. H. Tidwell.)

A. What date?

Q. Under the date of January 27, 1911, and the destination of the coal which was discharged from day to day from that steamship and likewise the final summary of the entire cargo discharged, and ask you if you will look at the entries made by the defendant Mills with reference to the discharge of that imported coal brought to this port into this steamship?

[294—240]

A. I have it here; I can read it to you. On January 27, the steamship "Thor" 245 tons, 1070 lbs., to the wharf bunkers. 63 tons, 1288 lbs., to yard bunkers. 106 tons, 370 lbs., to the "Ruth."

Q. That is a barge, is it not?

A. Yes. 415 tons, 480 lbs.—the record does not show where that was placed.

Q. That is the total discharge for that day, is it not? A. That particular day.

Q. That represents the total coal discharged that day? A. Yes, that is true.

Q. Now, I call your attention for a moment to "U. S. Exhibit No. 126," to the daily report signed by E. Mayer, and ask you if those figures do not tally?

A. 245 tons, 1070 lbs. to the wharf bunkers, 63 tons, 1288 lbs. to yard bunkers; 106 tons, 370 lbs. to the "Ruth"; total 415 tons, 480 lbs.

Q. That is correct, is it not? A. That is correct.

Q. So that the entries to which you have just referred made by the defendant Mills in the diary kept by him and the entries made by the defendant Mayer in his daily report show that there was discharged

(Testimony of W. H. Tidwell.)

upon the barge "Ruth" 106 tons, 270 lbs.?

A. On that particular day.

Q. On that particular day. The other two entries we are not concerned with at the present time. The wharf bunker referred to in these daily reports means the inshore bunker, does it not?

A. The inshore bunker.

Q. Turn to the discharge of the coal contained in this book on the next day. A. On the 28th?

Q. That would be January 28th?

A. January 28 and 29, the record is shown here. 632 tons, 1220 lbs. wharf bunkers; [295—241] 688 tons, 240 lbs. yard bunkers; 289 tons, 2010 lbs. off-shore bunkers. 195 tons 1410 lbs. to the barge "Ruth"; I think that you will find that that has been added, the total of the two days' discharge, making a total of 1806 tons, 400 lbs., discharged during the two days.

Mr. McCUTCHEON.—Q. Will you give the amount that you said the "Ruth" was charged with?

A. January 27th, 106 tons, 370. lbs.

Mr. ROCHE.—Q. The entries which you have just read to me refer to the dates January 28 and January 29; is that correct?

A. January 27, 28 and 29, there are three days there.

Q. And the total there is what?

A. 1806 tons, 400 lbs.

Q. Now, that is for January 27, 28 and 29th.

Mr. McCUTCHEON.—Q. Now, give the amount that went on the "Ruth"?

(Testimony of W. H. Tidwell.)

A. Up to the present time, 195 tons, 1410 lbs.; on the 27th of January 106, tons, 370 lbs.

Mr. ROCHE.—Up to that point of time, that is, taking into consideration the discharge of the coal during those first three days, there was discharged from the ship 2142 tons, 1470 lbs. Is that correct?

A. That is the fourth day's discharge.

Q. Look at your records of the 29th; there was a total discharge to the amount of 1806 tons, 1400 lbs.

A. That is correct.

Q. If you will look at the summary contained at the bottom of the daily report for January 29th, 1911, there is shown there, is there not, that there was discharged—

A. (Intg.) 1806 tons, 1400 lbs.

Q. That is the total discharged up to the evening of that day? Is that correct?

A. Yes. [296—242]

Q. And tallies with the figures kept by Mr. Mills?

A. Yes.

Q. Just proceed a little bit further. What do the entries by the defendant Mills in that diary show so far as the discharge of this boat is concerned on January 30, 1911?

[Testimony of N. K. Wills, for the Government.]

N. K. WILLS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I reside and have resided since 1907 in Seattle. I am a master mariner. I first visited Nanaimo in

(Testimony of N. K. Wills.)

1908. I have been there off and on a good deal. Since 1910, I have been there about ten months a year. I last visited Nanaimo in October, 1912. When I was residing at Nanaimo I was Acting Port Warden. My duties as such were to see that the vessels and scows were properly loaded and dispatched. I was also required to see that the vessels were properly loaded with coal at Nanaimo. Before I became port warden at Nanaimo, taking up my residence there, I had charge as master mariner for two years of a boat that visited Nanaimo about once every six weeks to take on coal destined ordinarily for Seattle. The name of my boat was the "Two Brothers." It was a barge carrying about 2,000 tons of coal. During the period when I was master mariner upon the "Two Brothers," and also during my residence at Nanaimo for ten months of each of the years 1911 and 1912, I found out the way the Western Fuel Company handled their coal in connection with weighing and discharging the coal into bunkers and into ships at Nanaimo. There was a scales-house at Nanaimo. It is about half way between the mine and the dock,—I should say it was about a quarter of a mile from the dock. [297—243] There was only one scales in the scales-house that I know of, but of course I have not visited Nanaimo since 1912. The scales was located right in front of the scales-house. Only one track consisting of two rails passed over the scales. That track came from the mine and proceeded to the different docks. A number of spurs or switches intersected the track.

(Testimony of N. K. Wills.)

Those switches or spurs ran off from the main line all along the main line, from said main line to the dock,—some between the mines and the scales, and some between the scales and the dock. The coal which would pass over the spurs or leads and ultimately reach the various docks would first pass over the tracks upon the scales. Some of the spurs or leads would connect with the main line between the scales-house and the mine.

I saw cargoes being weighed at the scales-house while I was at Nanaimo pretty often. I was frequently in the scales-house myself. This was all while I was residing at Nanaimo. I had no occasion to visit the scales-house while I was master mariner of the "Two Brothers." I used to take a tally of the cars that were discharged into my barge. I was just endeavoring to get a rough idea of how many tons went in. There was, of course, a tally kept of every car that was discharged into my barge. I did not have occasion to visit the office often, but I went up there sometimes. I did not visit the scales officially, but I did visit them unofficially. I saw them weigh coal. I never saw a carload of coal discharged into my boat, while I was captain of the "Two Brothers," which had not passed over the scales. I used to obtain my bill of lading and invoice, after the barge was loaded with coal, at the wharfinger's office. I do not know of my own knowledge how the weights set forth in the invoices or bills of lading were ascertained, [298—244] nor who furnished the weights or the invoices. The wharfinger presented

(Testimony of N. K. Wills.)

the bill of lading to me for signature. The scales-house was within my observation when I was counting the numbers of cars discharged into my barge. I used to see the cars as they approached from the scales-house. Each and every one of those cars that were within my observation first passed over the scales before they reached the dock. When I was residing at Nanaimo I saw cars run over the scales every day. The cars would stop when they reached the scales. I was sometimes in the scales-house myself when cars containing coal were being weighed. Never to my knowledge while I was a resident at Nanaimo was a carload of coal discharged upon the docks, either into vessels or bunkers, which was not first weighed. When I was master mariner of the "Two Brothers" the coal was discharged directly into the barge, not through a bunker. The process was by knocking the bottoms out of the wagons or cars and dropping the coal down a chute. There were bunkers located upon the docks at Nanaimo. Coal was discharged from time to time into these bunkers. It was then taken out for the purpose of loading boats. Every carload of coal that went into my boat was counted by me. That was so I could get approximately the amount of coal on board every night. I knew approximately the amount of coal each one of those cars contained. I did nothing whatever with the calculation which I had made. I made no comparison between my figures and the weight of the coal contained in the bill of lading.

(Testimony of N. K. Wills.)

Cross-examination by Mr. McCUTCHEN.

There was only one bunker at Nanaimo, consisting of a number of large bins. I don't know whether or not the company [299—245] has more than one mine at Nanaimo. I did not visit any mine. I simply visited the office and the scales-house. I heard of a mine up there called the Northfield mine. The coal which was weighed on the scales and of which I have spoken was not coming from that mine. The Northfield mine belongs to the Western Fuel Company, and coal is constantly being shipped from it by the Western Fuel Company by steamers. The steamers load at Northfield. I never saw any of that coal weighed on those scales. I have been at Northfield. I do not know the percentage of coal shipped from the Northfield mine as compared with the percentage shipped from the mine, the coal of which I saw weighed. I have no information whatever that would enable me to state that percentage. I am not prepared to say that more coal was taken from the Northfield mine than from the mine the coal from which was weighed on the scales to which I have referred. It is my understanding that the coal having been weighed on the scales then goes by car along the extension of that track to the bunkers or to the ships. There were ordinarily 25 cars in a coal train. The locomotive followed the cars. They were weighed one at a time. I do not know what the locomotive weighed. I do not think it ever went on the scales; at least I never saw it go over the scales. After the cars were weighed, the train was hauled

(Testimony of N. K. Wills.)

back and switched off. The switches that I have mentioned were not all between the mine and the scales-house. There could be switches the other side of the scales just as well. I do not know why it was necessary to pull the train back. I never saw a train that was weighed that was not pulled back before being switched. The uniform experience when I was there was to pull the train back toward the mine after the coal was weighed. I still say that [300—246] there were switches on both sides of the scales-house. I never saw any congestion of cars between the scales-house and the bunkers. I have seen more than one train on the track between the scales-house and the bunkers, but I could not say how many. As port captain at Nanaimo it became my duty to go to the Northfield bunkers from time to time, but I went there very seldom, perhaps two or three times a year when my own vessel was loading, and only then. I did not go there when I was port captain to see other vessels load. I know of my own knowledge that other vessels did load there frequently; they were large vessels. I know that from actually having seen the vessels loading. There was a very large quantity of coal loaded at the bunkers connected with the Northfield mine during the years I was port captain; and a large number of vessels and a large number of steamers of large tonnage loaded at those bunkers during the years that I was master mariner and running a barge from Nanaimo to Seattle.

Redirect Examination by Mr. ROCHE.

My barge sometimes called at Northfield. I do

(Testimony of N. K. Wills.)

not know whether there were any scales located near the Northfield mine or between the Northfield mine and the bunker. I know of my own knowledge that every one of the twenty-five cars that was shoved on the scales by a locomotive at Nanaimo was weighed on the scales. The coal that I took from Nanaimo in my barge to Seattle was lump coal which had passed over the screen. It was called Nanaimo lump coal. When I was port captain at Nanaimo I frequently saw other boats loaded with cargoes of coal. They were always loaded in the same way.

Q. You testified upon cross-examination that you sometimes saw as many as three train loads of cars between the scales and the bunkers; is that correct?

A. Yes, sir. [301—247]

Q. Did you ever see any of those cars weighed?

A. No, sir.

Q. Before those cars would reach the bunkers, or before they would reach the ship into which the coal would be discharged, would you observe the cars being moved upon the scales? A. Yes, sir.

Recross-examination by Mr. McCUTCHEON.

I have seen a ship partly loaded at Northfield and partly loaded at Nanaimo. That occurred quite often. I was employed by Frank Waterhouse & Company when I was port captain. That corporation was a shipping company located at Seattle.

[Testimony of W. J. Dougherty, for the Government.]

W. J. DOUGHERTY, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live now and have lived for about seven years in San Francisco. I have been United States weigher since the 25th of November, 1913. Prior to that time I was assistant weigher for a year and a half connected with the customs-house in San Francisco. Before that I was in the customs service here as a clerk. When I was assistant weigher I had occasion to visit the scales-office of the Western Fuel Company on the Folsom street dock. I acted as assistant weigher there a number of times before I became weigher, perhaps 15 times. Those were occasions when a vessel was being discharged of foreign imported coal. I was weighing the coal. It was the custom to weigh the coal on a rising beam.

Q. Now, I want you to go on and explain to the jury in [302—248] your own way what you mean by a rising beam.

A. Well, a rising beam is such a beam as when released by the upper brake, if the scale is at balance, will rise with a gentle upward motion, and if allowed to come to rest or to equilibrium, will rise at the center of the scale.

Q. Will rise at the center of the scale?

A. Between the upper and the lower brake.

Q. Was the practice in which you indulged to

(Testimony of W. J. Dougherty.)

weigh the coal when the beam would rise rapidly?

A. No, sir.

Q. Did you ever see that practice indulged in?

A. No, sir, I never did.

Q. Do you know of your own knowledge approximately what the difference in weight of the coal which you were weighing would be if the coal were weighed upon a horizontal or even beam, and when weighed, as you did it, upon a gently rising beam?

A. It would not be over ten pounds to each weight that was taken.

Q. And what was each weight that was taken, approximately?

A. Well, approximately about five tons.

Q. In other words, the Western Fuel Company would have the advantage of not more than ten pounds upon each weight taken, which would be in the neighborhood of five tons; is that correct?

A. Yes, sir.

Q. And what part of that gross tonnage would represent the tare weight, that is, the weight of the cars, approximately?

A. Well, approximately, the cars weighed about 10,000 pounds.

Q. So that it would represent about 10,000 pounds of coal; is that correct?

A. A little over ten thousand, about five tons.

Q. In other words, they would get the benefit of not to exceed ten pounds of coal in a weight of ten thousand pounds of coal?

A. Yes, sir, as I understand it. [303—249]

(Testimony of W. J. Dougherty.)

Cross-examination by Mr. STANLEY MOORE.

I am now the chief weigher. At the present time there are 23 assistant weighers under me. The number was formerly 25. I am not weighing coal any more. The duty on coal was declared off last October. Before I became assistant weigher I was employed most of the time in what is known as the first division, under the collector. My duties were of a clerical nature and included invoices on the cargoes of coal. I did no actual weighing. I became assistant weigher September 6, 1912. I was not appointed to that position at the request of Mr. Tidwell, but at the request of the collector, who promoted me.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Q. What other commodities were weighed by you, just generally, outside of coal, during the year and a half approximately that you occupied the position of an assistant weigher?

A. Well, I weighed various commodities at the Pacific Mail dock, rice, beans, some chow, as it is known, which is Japanese and Chinese foodstuffs; I also weighed at various places pig iron, coke, casks of different materials, chemicals and various things of that kind.

Q. When you were weighing the pig iron, you weighed that also, did you not, with a rising beam?

A. Yes, sir.

Q. What commodities or articles outside of coal

(Testimony of W. J. Dougherty.)

and pig iron were you accustomed to weighing with the rising beam?

A. Well, coke is one; in fact, the greater number of articles; the regulation is that on almost everything the rising beam is used, anything of a bulky or cumbersome nature. [304—250]

Q. Anything of a bulky or cumbersome nature; the regulation is that coal shall be weighed with a rising beam, is it not? A. Yes.

Q. And that pig iron shall be weighed with a rising beam?

Mr. ROCHE.—Just a moment. That is objected to as immaterial.

Mr. STANLEY MOORE.—I want to examine him, if your Honor please, as to what things were weighed with a rising beam.

The COURT.—The question will be permitted; just what light it will shed on this subject, though, I could not say.

Mr. STANLEY MOORE.—Q. Salt was weighed with a rising beam, was it not?

A. I have never weighed salt, so I cannot say personally.

Q. Is it not a fact that most of the articles are not weighed on a rising beam?

Mr. ROCHE.—That is objected to, may it please the court, as calling for the conclusion of the witness, and upon the further ground that the regulation upon which counsel relies has already been read in evidence.

Mr. STANLEY MOORE.—It goes to his knowl-

(Testimony of W. J. Dougherty.)
edge and his experience as a weigher.

The COURT.—The objection is sustained. You might inquire into his knowledge and experience as a weigher of coal, if you wish to.

Mr. STANLEY MOORE.—Very well, your Honor, we note an exception.

I have weighed coal at the Green street bunkers but very infrequently. I recall having been there once for a week when a ship was discharging. I have also weighed at the [305—251] Howard wharf in Oakland, and I have weighed overside at China Basin. By weighing overside I mean when a vessel is discharging into a barge from its deck, or into another vessel from the deck of the first mentioned vessel. The vessel on which I weighed overside at China Basin was one of the Harrison liners. The occasion was prior to Christmas, 1912. The vessel came, I think, from Antwerp. I think she was being unloaded. I have on a number of occasions weighed coal out of a barge into a vessel carrying the American flag. I would say that I have done that oftener than I have weighed coal on the Folsom street bunkers. I think I have weighed coal from barges into pretty nearly all the vessels of the Pacific Mail Steamship Company. I remember having weighed coal into the "Korea." The first thing that an assistant weigher does before beginning to weigh coal at Folsom street is to test the balance of the scale. I used to do that of course. The purpose is to find out whether there is any weight upon the scale, and to make sure that it is going to weigh cor-

(Testimony of W. J. Dougherty.)

rectly. If a scale does not balance, we look around to see what is the matter, and if the platform is clean and swept. If the scale does not balance, then we can by resorting to a certain contrivance on the scale, make it balance. I would not go on with the job until I got the scales balanced. The scales, having been balanced, we are ready to begin weighing. We take the tare weights during the weighing of the first ten cars. We feel that we get a more correct tare if we wait until the cars have loosened up a little, so we weigh usually the fourth or fifth. Often times the four hatches are all working during the discharge of a vessel at Folsom street. One hopper is allotted to each hatch, I think, but I have not observed that closely. It is important to keep [306—252] the hatches clear and the hoppers from clogging so that the work may proceed apace. The locomotive approaches the scales with two cars attached. They are weighed two at a time. One car is called the locomotive car, and two cars are attached to it. Then there is another locomotive and two more cars, so that you have a double train. When you are detailed to Folsom street as an assistant weigher your orders are to remain there with the job until the work is completed, and you do so unless some one is sent there in an emergency to relieve you, or something of that kind. I have worked there four or five days on a stretch in unloading a vessel. On other occasions we have unloaded a vessel in three days. About 4,000 tons, I should think, would be handled in four or five days. The most that I re-

(Testimony of W. J. Dougherty.)

member going up to the scales are four cars in a train aside from locomotive cars. I do not remember any long strings of cars attached to the locomotive. In fact, I remember that they did not have strings of cars. Two cars are weighed at a time. I have seen weighing done in a very short space of time. I think it takes longer than ten seconds. I have seen some people slower and others faster than I weigh. I do not think I have seen two cars weighed in less than ten seconds. Candidly, I do not know how long it takes me to weigh two cars.

Q. The operation that you go through with, Mr. Dougherty, is that you have the beam clear down and then you start back?

A. The beam is down, yes.

Q. When you start back, how long does it take you before you make your weight?

A. I cannot set the exact time.

Q. You cannot set any exact time? A. No.

Q. Is it not a fact that you carry your pin back, or poise, and when you see the beam start to rise, the time that you figure is right that it will rise, you make some kind of a movement which clamps the scales and brings the whole proceeding instantly [307—253] to a halt, do you not? That is a fact, is it not, Mr. Dougherty?

A. That is a fact, yes, sir.

Q. As a matter of fact, you don't generally wait for it to go up to the top and down at all, do you?

A. No, sir.

Q. You just guess at it, so to speak?

(Testimony of W. J. Dougherty.)

A. Well, I don't think that is hardly the word to use.

Q. You use your judgment on it, do you?

A. Yes, sir.

Q. You don't wait for the beam to go up there and come back again, do you?

A. Not usually, although I have done it if I was not satisfied.

Q. But as a usual thing with you weighing coal that way, time after time when the beam starts to rise, you clamp this adjustment on, or whatever it may be, and bring this proceeding to a halt, do you not?

A. No, not when it starts to rise; I let the beam rise some little distance. If in my judgment it rises so it will return to the central position, I clamp the beam. But, as I was saying, if it goes with too great a speed, and I am in doubt, I would then let the beam go up to the upper notch and descend before clamping the beam and fixing the weight.

Q. But that is not what you usually do, is it? In the number of weighings that you would make in a day, that would be the lesser proportion in which that movement would occur, would it not?

A. It probably would be.

Q. What is the space, Mr. Dougherty, that the beam has an opportunity to rise up and down in?

A. Between the two clamps, do you mean?

Q. Yes.

A. That space is about 2 3/8 inches, or something of that kind.

(Testimony of W. J. Dougherty.)

Q. And what part of that space is usually traversed by that beam before you bring the proceedings to a halt? A. About half of it. [308—254]

Q. Then, after the beam has arisen a little over an inch you bring the matter to a stop, do you not?

A. If the beam were rising so that I thought it would settle at center.

Q. And at other times you will let it go clear to the top?

A. If I thought the beam was too heavy, I would let it go to the top in order to move back and get the proper weight.

Q. Who reads the weight that is thus arrived at, Mr. Dougherty?

A. The weigher in charge, the assistant weigher.

Q. Do you know of your own knowledge, Mr. Dougherty, having in mind the process of weighing usually followed by you, namely, where you bring the proceedings to a stop after the beam has commenced to rise and when it has got about half way up through this space, on a Fairbanks-Morse scale designed to weigh quantities of 20,000 pounds, do you know how many pounds it takes to break that beam and cause it to rise?

Mr. ROCHE.—That is, you mean to rise at all?

Mr. STANLEY MOORE.—Yes, that causes the beam to rise, where it is clear down on the bottom like you say that it is when you begin this process of weighing?

A. Well, almost any weight on the platform will cause the beam to rise somewhat.

(Testimony of W. J. Dougherty.)

Q. But where you are weighing 20,000 pounds, and your beam is already down and is clear down, as I understand it is when you commence this usual process of weighing, do you say that almost any quantity will cause it to rise, then?

A. I don't know that I get your question clearly.

Mr. ROCHE.—You mean any quantity above the exact weight, do you?

Mr. STANLEY MOORE.—I will examine him,
Mr. Roche. [309—255]

Q. Assume, for the purposes of the question, Mr. Dougherty, that there are two cars on the scales, and that you weigh them two at the time, and that the gross weight of those cars with their contents is in the neighborhood of 20,000 pounds; and we will assume that you have gone through these preliminary movements that are characteristic to every weighing, and by manipulation of the poises have got the beam clear down; you understand what I mean now?

A. The beam would be clear down at starting; the beam is down at starting.

Q. Yes; do you know how many pounds it takes to break one of those scales in excess of the object that is actually upon the scales, where it is clear down, and to cause it to rise that way?

A. You mean to rise beyond the center?

Q. Yes. A. Beyond the center upwards?

Q. I do.

Mr. ROCHE.—That is objected to, may it please the Court, on the ground that the question put by

(Testimony of W. J. Dougherty.)

counsel to the witness does not mean anything of the kind.

Mr. STANLEY MOORE.—Well, I am willing to have it meant that way. He can answer it the way he wants to.

Mr. ROCHE.—But the difficulty about that is, that the question is in the record, and the question that is in the record calls for a weight to break the scales.

Mr. STANLEY MOORE.—Q. We will assume, then, Mr. Dougherty, just as you suggested here, that there are 20,000 pounds on the scales, and that the beam is all of the way down; now, do you know how much weight, in excess of the actual weight of 20,000 pounds that we assume to be on those scales, will cause that beam to come up and go above the center of that space of $2\frac{3}{8}$ inches? [310—256]

A. May I ask for one explanation of your question?

Q. No, just answer the question.

A. Well, will you kindly repeat it, I don't quite understand it yet.

Q. Certainly, I will do that. Assume, Mr. Dougherty, that the actual weight represented by the two cars and their loads, which was then upon the scales, to be 20,000 pounds. Now, assuming that you are going to weigh that, and that you have shoved over the poises until the beam is clear down; now, do you know how much, if any, weight in excess of 20,000 would cause that beam to rise above the center of that space of $2\frac{3}{8}$ inches?

(Testimony of W. J. Dougherty.)

Mr. ROCHE.—That question, may it please the Court, is objected to on the ground that it is unintelligible.

Mr. STANLEY MOORE.—Q. Do you understand it, Mr. Dougherty?

A. I don't see what the first part of it has to do with the latter part.

Q. Do you know whether it would take from 20 to 30 pounds, or do you know whether or not you would have to give that weight of 20,000 pounds actually upon the scales a credit of 20 or 30 pounds in order to cause that beam to rise above the center line, where the beam was all the way down to begin with?

A. You would not have to give that much.

Q. Do you know how much you would have to give?

A. I think you would have to give about ten pounds, not over ten pounds.

Q. You think you would have to give ten pounds, do you not, from the fact that those scales are graduated about that way?

A. No, sir, not necessarily.

Q. Have you made any experiments with a Fairbanks-Morse scale built and designed for weighing objects as heavy as 20,000 pounds to determine whether ten or twenty pounds would cause the beam to rise above the center, under the conditions that I have just mentioned to you?

A. Not with 20,000 pounds of weight, no. [311—
257]

Q. You have spoken about seeing other people weighing; have you seen weighing done there so

(Testimony of W. J. Dougherty.)

quickly that they did not wait in any case for the beam to go clear up to the top?

A. I cannot say that I have.

Q. You have seen weighing done more rapidly than is customarily done by yourself, have you not?

A. I have.

When I was weighing down there, there would be present the clerk, the weigher of the Western Fuel Company, and sometimes, if the ship were a foreign ship, her clerk, or perhaps the clerk of some consignee. The Government weigher did the actual weighing, and called off the weight; and if I were the Government weigher, I would be the one who would do that. When I was weighing coal from the barges into vessels carrying the American flag, one tub out of 15 would be weighed.

Redirect Examination by Mr. ROCHE.

I never have seen any custom-house weigher weigh coal upon the scales of Folsom street too rapidly to weigh the coal correctly.

Q. Suppose those scales were set by you to weigh a load of 20,000 pounds, and suppose a load of 20,010 pounds were run upon those scales, in what position would the beam be after that weight was located upon the scales? A. The beam would rise.

Q. How high would it rise?

A. It would rise to the upper brake.

Q. That is, to the upper part of the frame; is that correct? A. Yes, sir.

Q. With ten pounds more than the 20,000 pounds on the scales? A. Yes, sir.

(Testimony of W. J. Dougherty.)

Mr. ROCHE.—Take the witness.

Recross-examination by Mr. STANLEY MOORE.

Mr STANLEY MOORE.—Q. Do you think that a scale designed for weighing 20,000 pounds is as sensitive and will rise [312—258] as quickly where the beam is clear down to the bottom as it would if a corresponding weight were put upon it and the beam was already at the top? Do you think it will move as quickly?

A. I don't quite understand your question.

Q. Well, the question is intended to be this: Generally, do you think that a scales would be as sensitive to some weight added to an already existing weight upon the scales where the beam was clear down as it would be if it were all the way up; in other words, do you think it will go up as quickly as it will come down?

A. It will go up, but I don't know about the quickness of it.

Q. And you never have made any experiments with respect to that?

A. I have, but not to that amount, not to 20,000 pounds.

Q. Well, you know, do you not, that scales are more or less sensitive according as to the largeness of amounts and the heaviness of weights which they are designed to weigh? You know enough about scales to know that, do you not?

A. I think I do.

Q. Well, that, according to your judgment, is the fact, is it not? A. Yes.

(Testimony of W. J. Dougherty.)

Q. The sensitiveness of scales varies somewhat as to the amount of weight which they are designed for weighing? A. Yes.

The twenty odd assistant weighers in the Government service are shifted about so that no particular weigher was assigned permanently to duty upon the Folsom street dock, but that would not be true with regard to the other docks.

Further Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. I just want to ask you two or three questions, Mr. Dougherty. How small a quantity of coal in weight can be weighed or could be weighed upon these scales?

Mr. STANLEY MOORE.—If he knows.

A. Well, I imagine that five pounds of coal could be weighed.

Mr. ROCHE.—Q. In fact, you testified upon cross-examination [313—259] that sometimes when you would endeavor to test the scales, you would have to have the scales cleaned off so that the scales would balance? A. Yes, sir.

Q. By the way, Mr. Dougherty, it is true, is it not, that by revolving this contrivance upon threads which is located upon one end of the beam, so as to make the scales balance, the scales can balance and yet not weigh accurately; is not that correct?

A. That is true.

The weigher at the scales-house faces, as near as my judgment is, towards the west, with his back towards the operations on the dock. If he were to turn around, during the rapidly moving operations

(Testimony of W. J. Dougherty.)

on the bunkers, he could, from his station in the scales-house, not see much of anything. He could see the westerly side of a hopper, but he could not see the coal coming up; he could see part of one car that is being loaded from the hopper nearest to the west. I do not think, however, that he could see the coal actually being discharged even into the first car. He could see the bucket coming up from the ship to be discharged into the first hopper. If the weigher turned around he could not then see the coal discharged from the first hopper into the cars located underneath the hopper. He could only see part of the car. He could not see the entire operation. My impression is that he could not see the chutes protruding down from the bottom of the first hopper. The weigher from his position in the scales-house cannot see the position of the cars upon the scales. The space between the top of the coal-cars and the bottom of the hoppers is not very great.

(The attention of the witness is here directed to a photograph marked "United States Exhibit No. 7" which purports [314—260] to have been taken through the easterly window in the scales-house, looking out of that window when there is no coal-car underneath the first hopper.) This photograph represents just about what you can see by looking out of that window where there is no coal-car underneath that first hopper.

I have sometimes seen a car partially filled at the first hopper, and then run back, but I do not know where it got the rest of its load, though I presume,

(Testimony of W. J. Dougherty.)

from another hopper. When the car backed away from the first hopper in that fashion, I could not tell what became of the coal within it. The constant discharge of coal from the ship into these four hoppers creates more or less noise; in fact, the coal dropping from the bucket into the four hoppers, and the noise of the engine and the manipulation of these coal-cars and the motor car make a great deal of noise.

Further Recross-examination by Mr. STANLEY MOORE.

If the weigher were to get up and go to the window he could not see beyond the first hopper for any material distance.

(Conceded by counsel for the Government that the hoppers are necessary down there, considering the way the coal is handled.)

To my observation and personal knowledge, I can only say that the bunkers, the scales-house and the hoppers have been down there at Folsom Street only since I have been assistant weigher. I never knew personally that they were there until a year and a half ago. I had never been down there to see them.

[**Testimony of D. C. Norcross, for the Government (Recalled).]**

D. C. NORCROSS, recalled for the United States, testified as follows:

Mr. ROCHE.—Q. Mr. Norcross, when coal would be discharged from a barge and laden upon a vessel for fuel purposes, [315—261] would any memo-

(Testimony of D. C. Norcross.)

randa of such coal be sent by Mr. Mills to the Western Fuel Company? A. It would.

Q. That is, showing the quantity of coal laden upon the vessel and the particular barge from which the coal was discharged? A. Yes.

Q. And likewise the boat from which the coal was laden upon the barge either directly or by means of the offshore bunker or compartments contained in that bunker? A. I believe it shows that, yes.

Q. I call your attention to some cards fastened together and numbered from 1851 to 1999, and endorsed on the back "Coal Deliveries of Vessels, 1851—1999," and ask you whether those cards are not the cards sent by Mr. Mills, by the defendant Mills, to the Western Fuel Company, indicating the coal laden upon these vessels? A. Yes, they are.

Q. Would these be sent to the main office by Mr. Mills each day?

A. Whenever a delivery was made.

Q. Whenever a delivery was made? A. Yes.

Q. Who in the main office would receive those cards? A. The bookkeeper, Mr. Martin.

Q. Would they ultimately be turned over to you?

A. No.

Q. So that, as a matter of fact, Mr. Norcross, records such as these every time a vessel was loaded with coal for fuel purposes, would be sent by the defendant Mills to the office of the Western Fuel Company?

A. Yes.

Mr. ROCHE.—Will you admit the handwriting

(Testimony of D. C. Norcross.)

contained on those cards is the handwriting of Mr. Mills?

Q. It is a fact, is it not, Mr. Norcross, that each one of these cards is made out in the handwriting of Mr. Mills, so far as these are concerned? (Addressing counsel.) Subject to correction, [316—262] will you make that admission?

The WITNESS.—I think they are.

Q. In other words, Mr. Norcross, it was the custom of Mr. Mills to make out these cards or tags?

A. Yes.

Q. And they would be made out by him except when his duties were being temporarily performed by some other person? A. That is right.

[**Testimony of W. H. Tidwell, for the Government (Recalled)**].

W. H. TIDWELL, recalled for the United States, testified as follows:

Mr. ROCHE.—Q. Will you take that diary again, Mr. Tidwell. Let the record show that I am returning to the diary in reference to which the witness was being examined at the time court adjourned for the noon recess.

The WITNESS.—I think it was 1911 you were examining me about.

Q. You were being examined in relation to some data appearing under the dates January 27th to January 30th.

A. As to the discharge of the steamship "Thor"?

Q. Yes. A. Yes.

Q. Does that diary show the invoice weight of the

(Testimony of W. H. Tidwell.)

coal upon that steamship or does it simply show the shortage, if in fact there was a shortage?

A. It shows the weight discharged from day to day and after the completed discharge of the vessel shows the overage or shortage, in this instance, a shortage.

Q. Does it also show the out-turn weights, what is known as the ascertained weights?

A. From the steamer?

Q. Yes. A. Yes. [317—263]

Q. How many tons of coal are shown by that record—that is, the record kept by the defendant Mills, as indicating the out-turn or discharge weights?

A. 7190 tons, 1140 lbs.

Q. And the shortage is what?

A. Short 52 tons, 1100 lbs.

Q. Calling your attention to this summary which is signed by the defendant, E. Mayer, and to which your attention was directed this morning, I will ask you if it is not the fact that the figures which you have just given me, read from the diary kept by the defendant Mills, are similar to the figures appearing upon this summary? A. Yes.

Q. That has invoiced 7243 tons, discharged—

A. (Intg.), 7190 tons, 1140 lbs.; short 52 tons, 1100 lbs.

Q. But in the record kept by the defendant Mills which you hold in your hand, the invoice weight which here is given of 7243 tons, is not set forth?

A. Is not set forth.

Q. I would like to have you turn to the record

(Testimony of W. H. Tidwell.)

which you now hold in your hand, being the record kept by the defendant Mills, and state, if you will, what amount of the coal thus discharged from the steamship "Thor" was discharged into the various barges and into the offshore bunker or compartments of that bunker?

A. Does that question include the inshore bunkers as well?

Q. I do not care about the inshore.

A. The offshore bunker, 641 tons, 30 lbs.; the barge "Ruth," 195 tons, 1410 lbs.; the barge "Ruth" received again 349 tons; the barge "Nanaimo" 412 tons, 2090 lbs. The barge "Theobold" 946 tons, 1140 lbs.; the barge "Comanche" 702 tons, 1160 lbs.

Q. Have you got a total there of the quantity of coal discharged [318—264] into the barges and the offshore bunkers?

A. No, it is *totalled* separately; it is totalled together, including the wharf bunkers and the yard.

Q. Can you take a pencil, Mr. Tidwell, and I will only ask you to do it in this instance, for the purpose of getting the total from this document which I hold in my hand, being a summary of coal discharged from the steamship "Thor" upon that trip, so as to ascertain whether the totals appearing upon this discharge-sheet or summary-sheet equal those to which you have just testified. I will read them off to you: barge "Ruth" 106 tons, 370 lbs.; 89 tons, 1040 lbs.; 74 tons, 1300 lbs.; 274 tons, 940 lbs.?

A. 544 tons, 1410 lbs.

Q. Is that the exact weight which according to the

(Testimony of W. H. Tidwell.)

records kept by the defendant Mills was laden upon the barge "Ruth" taken off the steamship "Thor" upon that barge?

A. There are two items here; I will have to add these together, one of 195 tons, 1410 lbs.; and the other of 349 tons, 544 tons, 1410 lbs.; exactly the same.

Q. Exactly the same? A. Yes.

Mr. ROCHE.—With your Honor's permission, I just want to make two or three calculations, and I won't press this any further, so as to establish the identity between these records.

Q. Directing your attention again to the summary of the coal discharged from the steamship "Thor" upon this particular voyage, I will read to you the figures off of the summary signed by the defendant Mayer indicating coal deposited in the offshore bunker, 255 tons, 100 lbs.

Mr. McCUTCHEON.—What date is that? [319—
265]

Mr. ROCHE.—That is the same date. This is the summary-sheet, Mr. McCutchen, ranging from the 27th to the 30th of January.

The WITNESS.—They are looking for the barge "Ruth"; it is January 30th.

Mr. ROCHE.—This vessel did not completely discharge until the 3d of February, and in order to avoid taking up any further time, I have not called the witness' attention to any of these tally-sheets which were filed after the 30th of January.

Q. Referring again to coal which, according to

(Testimony of W. H. Tidwell.)

this record appears to have been deposited in the offshore bunkers, 255 tons, 100 lbs. 34 tons, 1910 lbs.; 79 tons, 1150 lbs.; 151 tons, 590 lbs.; 120 tons, 760 lbs.? A. 640 tons, 130 lbs.

Q. Is that the same quantity of coal which, according to the records are kept by the defendant Mills in the diary which you now have in your hands was deposited in the offshore bunker, from that sheet?

A. 641 tons, 30 lbs., a difference there of one ton and 100 lbs. Let us see if I have an error there. Yes, it is 641 tons, 30 lbs.

Q. The figures in the statement from which I have read tally, do they not, with the figures contained on the record kept by the defendant Mills?

A. They do.

Q. Will you also look at that record and see whether out of the coal discharged from the steamship "Thor" there was deposited upon the barge "Comanche" 702 tons, 1160 lbs.? A. Yes.

Q. And upon the barge "Nanaimo" 290 tons, 670 lbs.?

A. That does not check; the barge "Nanaimo" is 412 tons, 2090 lbs. [320—266]

Q. I see there is another entry here. Just take those figures, 290 tons, 670 lbs., and 122 tons, 1420 lbs., and see if the addition of those figures does not equal the amount which the record kept by Mr. Mills shows was deposited in that barge?

A. 412 tons, 2090 lbs.

Q. That tallies too, does it not? A. Yes.

Q. Directing your attention again to these entries,

(Testimony of W. H. Tidwell.)

Mr. Tidwell, for the purpose of verifying the dates, do the entries which are contained in that diary kept by the defendant Mills, show the actual deposits each day, for instance, in the offshore bunkers, and likewise in barges? A. Yes.

Q. Now, directing your attention to the date, January 27, 1911, the barge "Ruth," does that record show the number of tons as well as lbs. of coal discharged or rather laden upon the barge "Ruth," representing coal discharged from the steamship "Thor"?

A. I don't understand what you refer to, the discharge from the "Thor" or the receipt on the "Ruth."

The COURT.—He means both discharge from the "Thor" and laden into the "Ruth."

A. On January 27th there was discharged from the "Thor" 106 tons, 370 lbs., which was laden on the "Ruth."

Q. Now, on January 28th was there 89 tons, 1040 lbs. of the same coal laden upon the barge "Ruth"?

A. It shows a total; it does not show the difference of the two; a total of 195 tons, 1410 lbs.

Q. That would be, would it not, the first quantity plus 89 tons, 1040 lbs.? A. Yes.

Q. And that additional quantity of coal was deposited according to the record which you hold in your hand on the barge "Ruth" on January 28, 1911; is that correct? [321—267]

A. January 28 and 29; they are both under the same date here.

(Testimony of W. H. Tidwell.)

Q. The 28th and 29th. Now, will you also look at that record and ascertain whether on or before February 1, 1911, there was likewise laden upon the barge "Ruth" 74 tons, 1300 lbs. additional coal?

A. Yes, the record so states.

Q. Of this cargo? A. From the "Thor."

Q. On February 2, 274 tons, 940 lbs.; additional coal taken from the steamer "Thor"?

A. It shows on the "Thor" on February 2d, 195 tons, 1410 lbs. and then there is an additional amount of 349 tons on the "Ruth."

Q. Will you look at that record and see whether or not on the 2d of February there was discharged from this ship and laden upon the barge "Theobold" 693 tons, 1170 lbs.? A. The item so appears.

Q. And a further quantity of coal upon the same date, consisting of 252 tons, 2210 lbs., laden upon that barge, that is, the "Theobold,"—on the 3rd of February, I mean; is that correct?

A. It shows an increase to 946 tons, 1140 lbs. The difference between the two—I suppose that is correct.

Q. And the overage appearing as a result of the discharge of the steamship "Thor"—

A. (Intg.) A shortage.

Q. A shortage of 52 tons, 1100 lbs.?

A. That is correct.

Mr. ROCHE.—I would like to have the jury look at that entry.

Q. This entry is typical, is it not, Mr. Tidwell, of all the entries not only in this diary but in the re-

(Testimony of W. H. Tidwell.)

maining diaries which have been introduced in evidence kept by the defendant Mills; is that correct?

A. Yes, that is true.

Q. Where do these entries appear? The first one begins here [322—268] under date of January 27th, does it not?

A. Yes, and January 28th, January 30th and 31st, and continuous down to here, that entire column.

Q. That is the last item relating to this particular cargo appears under date of Friday, February 3rd; is that correct? A. Yes.

Q. And the last entry relating to the discharge of that cargo are the words and figures, "Short 52 tons, 1100 lbs."; is that correct?

A. Yes. You will usually find the discharge of the ship on the right hand side of the page, and the barges on the left.

Q. In other words, so that the jurors may understand these entries, the name of the ship from which the cargo is being discharged appears upon the right hand side of these pages; is that correct?

A. Usually, yes.

Q. And the barges?

A. On the left hand side of the page.

Q. The barges into which the coal is laden appears upon the left hand side of the page; is that correct?

A. That is correct.

Q. As well as the designation of the bunkers in the event the coal is discharged into the bunkers?

A. Yes.

Q. And instead of each quantity of coal after the

(Testimony of W. H. Tidwell.)

first day that is laden upon the barges or discharged into the bunkers being separately itemized, the totals are inserted here, are they not?

A. That is correct.

Q. In other words, if on the first day 500 tons is laden upon a particular barge and the next day 200 tons is laden upon that barge the record of the second day will contain the total quantity of coal, or 700 tons? A. 700 tons on the barge. [323—269]

Q. So that in order to ascertain the exact quantity of coal each day taken from a particular ship and laden upon a barge you would have to follow these items back from the discharge of the ship to the first day and make the necessary deductions; is that correct? A. That is true.

Q. Or subtract it.

A. Or, on the final discharge of the ship it will show the amount placed on each barge or bunkers or other place.

Q. That book, Mr. Tidwell, and I will call the attention of the jury to another item in that book likewise, shows, does it not, the quantity of coal taken from the barges at a subsequent date and laden into other vessels and likewise the overage wherever such overage occurs? A. That is true.

Q. That is the difference between the quantity of coal checked into the barge and the quantity weighed out of the barge? A. That is correct.

Q. And as I understand your testimony, in about 99 per cent of these cases there was also an overage?

A. Yes, I should say that much.

(Testimony of W. H. Tidwell.)

Q. In 99 per cent or more? A. Yes.

Q. The quantity of coal discharged from the steamship "Thor" and laden upon the barges, to which your attention has already been called, is set forth in your Table C, is it?

A. Not the "Thor," no; the "Thor" would be set forth in Table A.

Q. You did not understand my question. I mean the quantity of coal which originally came from the steamship "Thor" and was afterward laden upon these various barges and subsequently discharged into the vessels is shown in this Table C?

A. Yes. It will be shown—the various barges will be shown in Table C, showing the amount of coal that each received from [324—270] the "Thor."

Q. Now, Mr. Tidwell, let me ask you this question: The particular entries to which I have just directed your attention show that there was a shortage of some 52 tons upon the discharge of the steamship "Thor" below the invoice or bill of lading weight; is that correct? A. That is true.

Q. And those entries do also show that a considerable quantity of that coal was laden directly by means of the offshore bunkers, I suppose upon barges or in the offshore bunkers, which coal was subsequently laden upon barges, and with which coal vessels were coaled; is that correct? A. That is true.

Q. Is it not also the fact, Mr. Tidwell, that this same book which discloses the quantity of coal upon which the Western Fuel Company paid duties to the United States Government likewise shows an over-

(Testimony of W. H. Tidwell.)

age in so far as the discharge of that coal is concerned from the barge, and upon that overage the Western Fuel Company or rather the United States Government paid back to the Pacific Mail Company drawback claims? A. That is true.

Q. Or a part of the duties paid?

A. That is true.

* * * * *

Q. You have, as you have already testified, compiled a table, in which table appears the quantity of coal checked in to the barges and subsequently discharged from the barges into these vessels?

A. Yes.

Q. Will you take that table please, and point out that particular part of the table which relates to the coal which was discharged [325—271] from this particular steamship into these barges, and subsequently discharged from the barges into some of these vessels?

A. I will have to use that book in connection with it.

Q. Yes, start in with January 27th.

A. 1911?

Q. Yes; the cleanup might have occurred a few days after that date.

A. On the barge "Ruth"?

Q. Take the barge "Ruth."

Mr. McCUTCHEON.—What page of the transcript is that?

A. That is page 59, under date of January 30th.

Mr. ROCHE.—Q. That is on the table it appears under the date of January 30th?

(Testimony of W. H. Tidwell.)

A. Yes, that is the date of the cleanup of the barge.

Q. Will you just indicate to the jury what you mean by the cleanup of the barge?

A. When all the coal has been checked out of the barge.

Q. And until that is done, of course, it is impossible to tell whether there is an overage or shortage upon the barge? A. Yes.

Q. And the reason for that is that it equally occurs that the barge would take on, we will say for the purpose of illustration, 1000 tons of coal on one day and then discharge a part of that cargo and come back and take on 500 tons and then make another discharge and take some other coal on; until all of the coal was removed from the barge it would be impossible to tell there was an overage, and the quantity of overage; is that true? A. Yes.

Mr. McCUTCHEON.—Do we understand that the witness is testifying to that of his own knowledge or just agreeing with [326—272] you?

Mr. ROCHE.—You are testifying to that from these records, are you not?

A. The records appear to show it.

Mr. McCUTCHEON.—Do I understand that the witness says that all that he said appears in this book?

A. All of that is said in this record, from which this is compiled from.

Mr. ROCHE.—Q. That is with the exception of that exact quantity I have given you.

A. In other words, it does not state those words,

(Testimony of W. H. Tidwell.)
but it sets forth the quantities.

Q. Go right ahead?

A. Under date of January 30th the barge "Ruth" received, at least the date of the cleanup, the barge "Ruth" received 195 tons, 1419 lbs. from the steamer "Thor."

Q. On what page are you reading? A. Page 79.

Q. Under date of January 30th?

A. She also received from the offshore bunkers, 558 tons, 1970 lbs.; from the offshore bunkers, 6 tons, 60 lbs.; the offshore bunkers, 56 tons, 240 lbs., or a total of 816 tons, 1440 lbs.

Q. Just one minute; what was the number of the drawback upon which a claim was presented to the United States Government and upon which duties were returned by the United States Government to the Pacific Mail Steamship Company?

A. Drawback entries Nos. 62, 64 and 66; 62 being the "Peru"; 64 being the "San Jose," and 66 the "City of Para."

* * * * *

Q. Suppose you take Exhibit "C"; that Exhibit "C," as you already have testified, correctly sets forth the entries in so [327—273] far as they related to the barges; is that correct? A. Yes.

Q. In other words, they show the coal laden upon each barge which was laden with coal upon dates between April 1st, 1906, and the last of December, 1912? A. January 1st, 1906.

Q. From January 1st, 1904?

A. No, this shows from January 1st, 1906. There

(Testimony of W. H. Tidwell.)

is a different statement showing 1904 and 1905.

Q. Between January 1st, 1906, and the 31st of December, 1912, and the place from which the coal was taken which was laden upon the barge?

A. Yes. I think this one goes to November 20th, 1912, for the reason that no drawback was paid after that date; the payment of drawbacks was discontinued at that time.

Q. I direct your attention to drawback No. 62, and ask you to look at it and if you will make a comparison between the figures in that drawback and the table which you now hold in your hand, Exhibit "C," and find the entries relating to that drawback claim.

A. Entry for drawback for 275 tons of coal which is alleged to have been laden on the steamship "Peru," which arrived at this port on the steamer "Harpeake" December 17, 1910, custom-house entry No. 16,806.

Q. Now, by whom was that drawback claim made?

A. The claim was made by the Pacific Mail Steamship Company by J. S. Mattoon, Attorney in Fact.

Q. Will you turn to the table which you have in your possession at this time and state what entries appearing in that table, Exhibit "C," relate to that drawback concerning which you have just testified?

A. On this particular entry it is only for 275 tons. From the barge "Ruth" there [328—274] was laden on the steamer "Peru"—

Mr. McCUTCHEON.—Q. What page are you reading from?

A. Page 59. There was laden on the steamer

(Testimony of W. H. Tidwell.)

“Peru” 295 tons, 1062 lbs. There is a discrepancy here of 20 tons on this particular drawback entry, which will be taken up on some other entry on the same steamer.

Mr. ROCHE.—Q. How do you mean—that there was another claim for that?

A. There would be more than one claim in many instances for one vessel. It will go over for sometimes two or three weeks or a month, and the balance will be taken on some other claim.

Q. Now, I direct your attention to the entry of the steamer— A. (Intg.) Just one moment.

Mr. KNIGHT.—That figure of the steamer “Peru” there on page 59 should according to the diary be 275 instead of 295.

The WITNESS.—Yes, I was just figuring that at the present time. 275 tons, 1062 lbs., instead of 295 tons.

Mr. ROCHE.—Q. Refer for just a moment to the table which you have in your hand at page 59; that entry appears opposite the date January 30th, does it not?

A. January 30th, and this item should be 275 tons, making a total of 883, which is merely a clerical error in the figure.

Q. In other words, there was a cleanup on the barge on the 30th of January, 1911; is that correct?

A. The barge “Ruth.”

Q. That was the date upon which there was a cleanup on the barge “Ruth”; in other words, whatever coal she had on her was completely discharged?

(Testimony of W. H. Tidwell.)

A. Yes.

Q. She had taken upon her from the time of the previous [329—275] cleanup between that date and the 30th of January, 1911, how much coal in tons and lbs.? A. You mean the barge "Ruth"?

Q. The barge "Ruth"? A. 816 tons, 1440 lbs.

Q. That represents, Mr. Tidwell, so that the jury may understand it, the total amount of coal laden upon that barge between the date of the previous cleanup and the 30th of January, 1911, which was the next cleanup. A. That is true.

Q. And upon which date the overage, if there was any overage, was determined; is that correct?

A. Yes.

Q. Now, then, will you indicate to the jury from the table which you now hold in your hand or which you have in your possession and which represents the entries contained in the defendant Mills' book, what quantity of coal is laden from time to time upon the barge "Ruth" between the date of the previous cleanup and the 30th of January, 1911? * * *

A. From the offshore bunkers the barge "Ruth" received 558 tons, 1970 lbs.; from the offshore bunkers, 6 tons, 60 lbs.; the offshore bunkers, 56 tons, 240 lbs.; from the steamer "Thor" 195 tons, 1410 lbs.; or a total of 816 tons, 1440 lbs.

Mr. McCUTCHEON.—What was the date of that?

A. January 30th, page 59.

Mr. ROCHE.—Q. January 30th is, as you have already testified, the date of the cleanup?

A. The date of the cleanup.

(Testimony of W. H. Tidwell.)

Q. So that it was laden with coal upon four different occasions; is that correct? A. That is true.

Q. Upon each one of those occasions she received the amount of coal to which you have just testified?

A. Yes. [330—276]

Q. Making a total of 816 tons, 1440 lbs.; is that true? A. That is true.

Q. Now, will you state to the jury from the table, Exhibit "C," which you have in your possession, the disposition which was made of that 816 tons, 1440 lbs., and such additional coal as may have represented an overage?

A. On the steamer "Peru" there was laden according to the figures here 295 tons, 1062 lbs., which is an error; it should be 275 tons, 1062 lbs. On the steamer "San Jose" 317 tons, 222 lbs.; the "City of Para" 290 tons, 1432 lbs., making a total of 883 tons, 476 lbs., which was 66 tons, 1276 lbs. more than she had taken on board.

Q. Now, let me ask you this question, Mr. Tidwell: Of course, this represents foreign coal, as you have already testified?

A. In every instance; these exhibits only deal with foreign coal.

Q. Now, you have testified that between the date of the previous cleanup and the 30th of January, 1911, this barge took on 558 tons, 1970 lbs. from the offshore bunkers on one occasion, 6 tons, 60 lbs. on another occasion from the same bunkers, 56 tons, 240 lbs. from the same bunkers upon another occasion and 195 tons, 1410 lbs. from the steamship "Thor," aggre-

(Testimony of W. H. Tidwell.)

gating in all 816 tons, 1440 lbs. Was that what is known as the out-turn or ascertained weight upon which the Government of the United States received duties? A. Yes.

Q. In other words, so far as that coal is concerned, the Government was paid duty only upon 816 tons, 1440 lbs.? A. That is true.

Q. Now, each one of these boats, the "Peru," the "San Jose" and "City of Para" were American registered boats, were they not? [331—277]

A. Yes. Belonging to the Pacific Mail.

Q. Boats flying the American flag operated by the Pacific Mail Steamship Company? A. Yes.

Q. And foreign bound, is that correct? A. Yes.

Q. Now, as you have already testified, those 816 tons, 1440 lbs. of coal were subsequently laden, or was laden rather in those three boats?

A. On those three vessels, yes.

Q. And from the 816 tons, 1440 lbs., there was laden on the steamship "Peru" 275 tons, 1062 lbs.; into the steamship "San Jose" 317 tons, 222 lbs., and into the "City of Para" 290 tons, 1432 lbs.; is that correct? A. That is true.

Q. In other words, there was 66 tons, 1276 lbs. more coal put into the boats than had been checked out on the barge? A. Yes.

Q. And 66 tons, 1276 lbs. more coal laden into these three boats than upon which the Western Fuel Company had paid duties to the United States Government; is that correct? A. Yes.

Q. Now, is it also a fact, Mr. Tidwell, that for the

(Testimony of W. H. Tidwell.)

whole 883 tons, 476 lbs., representing 66 tons, 1276 lbs. more coal than upon which the Western Fuel Company had paid import duty, drawback claims were presented by the Pacific Mail Steamship Company against the United States Government?

A. Yes, and were paid.

Q. And were paid? A. Yes.

Q. In other words, so far as that transaction is concerned, the Government paid back, representing import duties, the duties upon 66 tons, 1276 lbs. more coal than upon which duties were paid in the first instance to the United States Government; is that correct? A. That is correct.

Witness continuing: There was 816 tons, 1440 lbs. of coal laden into the barge. The Government paid a drawback on 883 tons 476 lbs., which was 66 tons 1276 lbs. more than was in the barge. I got that from the Mills book which shows that all of the coal was laden into the "Peru," the "San Jose" and the "City of Para." The "Peru" is referred to on drawback 62, the "San Jose" on 64, and the "City of Para" on 66. It is a fact that the drawback claims presented by the Pacific Mail Steamship Company against the United States were for the return to it of duties on 66 tons 1276 lbs. more coal than was taken into this barge, as supported by the affidavits of some officials of the Western Fuel Company. That will be shown by the entries themselves. My answers simply refer to this particular transaction here of the "Ruth" and these other vessels. [332—278]

* * * * *

Mr. ROCHE.—Q. You have a claim there before

(Testimony of W. H. Tidwell.)
you, haven't you?

A. Yes, the drawback.

Q. I call your attention to two other drawback claims, and ask you whether the other two drawback claims represent the two drawback claims to which you have testified and which are indicated in that table?

A. One represents the "Peru," No. 62, for 275 tons; the other, No. 64, the steamer "San Jose," 317 tons, 222 lbs., which will probably be liquidated as 317 tons, not using the fraction; and No. 66 represents the "City of Para" for 291 tons.

Q. Now let me have them. I want to direct the jury's attention to some things appearing on each one of these drawbacks. Each of these drawback claims disclose, do they not, Mr. Tidwell, that the coal represented by the claim was originally imported into this country by means of the "Harpeake"?

A. In two instances only.

Q. The other is by the—

A. (Intg.) The "M. S. Dollar."

Q. I direct your attention to entry No. 1, 16,806, and ask you if that is the entry indicated upon two of these drawbacks?

A. That is the steamer "Harpeake," and on the face of the entry you will find the numbers of these particular drawback entries.

Q. In other words, that entry relates to the two of these drawback claims, each claim being made for the return to the claimant of duty paid to the United States Government upon the importation of this coal

(Testimony of W. H. Tidwell.)

in the steamship "Harpeake"; is that correct?

A. That is correct. You will find entry No. 62 and entry No. 64 referred to on this [333—279] sheet which has been presented by the Western Fuel Company.

Q. Or by the Pacific Mail Steamship Company?

A. No, that is the Western Fuel Company's statement.

Mr. ROCHE.—I desire to read to the jury, may it please the Court, the affidavit of the defendant James B. Smith, which is upon this.

The COURT.—Is it a document that is in evidence?

Mr. MOORE.—The signature to that affidavit is admitted, and I think it is in evidence.

Mr. ROCHE.—Yes. This is one of the entries that is already in the evidence, the affidavit of James B. Smith upon this document, upon which among other things, appear the references to these drawback claims: "Pacific Mail Steamship Company, Certificate of Delivery of Imported Merchandise, Port of San Francisco, February 10, 1911. Description of merchandise, coal. By whom imported: Western Fuel Company. How imported: Steamer 'Harpeake.' When imported: December 17, 1910. Where imported: San Francisco. Whence imported: Newcastle. Quantity: 2337 tons. Value: \$9,348. Rate of duty paid: 45 cents. Entry No. 16806. Bond No." blank. Under remarks, among other things appears in red ink the reference to these two drawback claims, one being numbered 62 and the other 64,

(Testimony of W. H. Tidwell.)

and of course upon this affidavit appear a number of other references to a number of other drawback claims. Is that correct, Mr. Tidwell?

A. Yes.

Mr. ROCHE.—Opposite 62 appear the following: January 17, 62, entry number, 275 tons. I direct the jury's attention to drawback claim 62, which is a drawback claim for 275 tons at the rate of 45 cents; January 24th, entry No. 64, tons 317. [334—280] I direct the jury's attention to the drawback claim already referred to by the witness No. 64 for 317 tons.

"I, James B. Smith, Vice-President and a stock-holder, Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damages or any other cause, except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Company between December 19th to December 24th, 1910, and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this Feb. 10, 1911, Geo. H. Probasco, Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 14, 1913."

Now, directing your attention to the remaining drawback claim which has already been referred to by you indicating that a certain quantity of coal, 291

(Testimony of W. H. Tidwell.)

tons of coal, was imported in the steamship "M. S. Dollar," which is the remaining entry in the item to which you have already testified, I will ask you to look at that end and state what number represents the number of the entry of that steamship "M. S. Dollar"?

A. No. 788, date of importation January 12, 1911.

Q. Now, I direct your attention to what purports to be a consumption entry and ask you whether that is the entry? A. Yes. [335—281]

Q. Let me have that drawback claim. Now, reading from a part of the drawback claim itself, it contains the following language:

"I do solemnly, sincerely and truly declare that the coal described in the within entry and now at vessel is intended to be used for fuel on board the above-described vessel and not to be relanded at any place or port within the United States, and that all of said coal was duly imported and that the duties thereon were paid at the port of San Francisco on or about 13th day of January, 1910. J. B. MILLARD."

The WITNESS.—That is J. S. Mattoon.

Mr. ROCHE.—It may be Mattoon.

Now, I direct the attention of the jurors to the affidavit of the defendant, James B. Smith, which accompanies this entry: "Description of Merchandise: coal. By whom imported: Western Fuel Company. How imported: Steamer 'M. S. Dollar.' When imported: January 12, 1911. Where imported: San Francisco. Whence imported: Nanaimo. Quan-

(Testimony of W. H. Tidwell.)

tity: 2976 tons. Value, \$11,904." I am reading in the tons and dollars because I assume that is what it means. "Rate of duty paid 45 cents. Entry No. 788. Bond No." blank. Under the remarks' column appears in red ink two entries. I will read both of them. "1911, Entry No. Tons. January 13, under the figures 1911. Entry No. 61. Tons, 2685. January 26, entry No. 66, 291 tons, making a total of 2976 tons.

Q. It is a fact, is it not, that these figures in red ink, so far as they relate to Entry No. 66, 291 tons, indicate the same number of tons as is set forth in that drawback claim? [336—282]

A. Yes.

Mr. ROCHE.—

"I, James B. Smith, Vice-President and stockholder Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Company between January 13th to January 17, 1911, and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this February 10, 1911. Geo. H. Probasco, Notary Public in and for the City and County of San Francisco, State of California."

Q. As I understand your testimony, Mr. Tidwell,

(Testimony of W. H. Tidwell.)

the United States Government did return or did pay to the Pacific Mail Steamship Company duty upon the entire quantity of coal represented by these three claims; that is correct? A. Yes.

Q. Which, as you have already testified, amounted in quantity to 66 tons in excess of the amount of coal upon which duty was paid? A. Yes.

* * * * *

Q. You were testifying yesterday afternoon, Mr. Tidwell, at one time upon direct examination, about percentages so far as the shortages appearing in the books of the defendant Mills and appearing in these various documents which have heretofore been introduced in evidence between the entire amount of coal [337—283] actually imported by the Western Fuel Company into this port, including partial cargoes which you have already testified you returned at the ascertained weight and the bill of lading or invoice weight; now, I will ask you whether, since court adjourned, and under your supervision, there was an estimate made of the percentage of shortage, taking into consideration the cargoes alone contained on this boat in which a shortage occurred; that is, when I say "a shortage," I mean a difference between the bill of lading or invoice weight and the amount of the out-turn weight? A. Yes, sir, there has been.

Q. I direct your attention to a statement appearing in lead pencil, and ask you whether that is the calculation showing that percentage?

* * * * *

Mr. ROCHE.—Q. Just give the totals now, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. This shows a total invoice weight of 1,413,600 tons—

Q. (Intg.) Before you leave that, Mr. Tidwell, that represents the total tonnage represented by the invoice or bill of lading weight of those cargoes which turned out short at this port?

A. Yes, sir. The total shortage was 26044 tons, 877 lbs.

Mr. OLNEY.—Q. What was the ascertained weight?

Mr. ROCHE.—The ascertained weight would be the difference between the shortage and the weight. He has not reached the discharge weight just yet.

A. (Continuing.) While it is not shown on this sheet, the ascertained weight would be 26044 tons, 877 lbs., less than the invoice weight; the percentage of shortage is 1.84.

Q. Directing your attention to Table A, which has been introduced in evidence as part of "U. S. Exhibit No. 125," while [338—284] we are talking about percentages you have of course come in contact—each instance being represented upon that table—with a number of shortages, have you? A. I have.

The witness here continued with the presentation Exhibit No. 125 Table A," with the intention that he should testify to and point out to the jury some of the more prominent shortages on foreign coal imported by the Western Fuel Company into the United States between April 1st, 1906, and December 31st, 1912; a separate table having been prepared for the period January 1st, 1904 to April 1st, 1906.) Table A shows the following prominent shortages:

(Testimony of W. H. Tidwell.)

On page 1, in the month of May, steamer "Turge Viking," invoice weight 5710 tons; ascertained weight 5544 tons 1080 pounds; a shortage of 165 tons, 1160 pounds, or a percentage of shortage of about 3 per cent.;

The steamer "Reidar," also on page 1 of Table A; invoice weight, 5810 tons; ascertained weight 5668 tons, 770 pounds; shortage 141 tons, or a little over 2 per cent.;

On page 2 of Table A, steamer "Titania," invoice weight 5655 tons; ascertained weight 5554 tons, 880 pounds; shortage 100 tons, 1360 pounds;

"Turge Viking," on same page of Table A; invoice weight, 5700 tons; ascertained weight 5515 tons, 790 pounds; shortage 184 tons, 1450 pounds, or a percentage of shortage in excess of 3 per cent.

The witness here continued with the presentation to the jury of similar shortages appearing in said "United States Exhibit No. 125, Table A," [339—285] reading off in each case the name of the vessel; the date of her discharge; the page of Table A upon which the entry appears; the invoice weight; the ascertained weight; the shortage in tons, and the shortage in percentages. The vessels referred to and the percentage of shortage are as follows, all occurring, of course, within the period April 1st, 1906, to December 31st, 1912:

"Titania," approximately 2%;

"Turge Viking," over 4%;

"Tellus," about 4½%;

"Tordenskjold," about 3½%;

(Testimony of W. H. Tidwell.)

The witness here remarks that there are a number of shortages in the table which are below the percentages to which he has above testified, and also that there are some cases of overages. Continuing with the names of the ships and percentages of shortage, as appearing in Table A, he gives the following data:

- “Sheila,” approximately 2%;
- “Hercules,” about 2½%;
- “Sheila,” a little in excess of 2%;
- “Tellus,” about 3%;
- “Wellington,” about 3%;
- “Tordenskjold,” about 5%;
- “Tordenskjold,” about 4½%;
- “Hazel Dollar,” about 7%;
- “Titania,” a little more than 4%;
- “Jethon,” about 4%;
- “Tordenskjold,” approximately 5%; [340—
[286]
- “Finn,” (this is a case of an overage of 38 tons,
1940 pounds—the only instance of an
overage in the month involved);
- “Tordenskjold,” between 5 and 6%;
- “Bessie Dollar,” about 6½%;
- “Hornelen,” about 5 or 5½%;
- “Bankfield,” about ½ of 1%;
- “Indra,” about 3½%;
- “Marcellus,” about 7%.

Q. By the way, before referring to any other entries, it is a fact, is it not, Mr. Tidwell, that the duties paid the United States Government upon the discharge of this coal were paid upon what you have

(Testimony of W. H. Tidwell.)

testified to be the ascertained weight?

A. Yes, sir.

Q. And not on the invoice or bill of lading weight?

A. No, sir.

Q. Now, turning back to Table C, which you have in your possession, Mr. Tidwell, does that table cover all of the entries appearing in the defendant Mills' books, between January 1, 1906, and the latter part of 1912?

A. No, sir; not all of the entries.

Q. I mean all of the entries in so far as they relate to coal being laden upon barges, and the discharge of those barges?

A. It relates merely to the out-turn of barges on which there were overages.

Q. Have you figured up some of the percentages showing the quantity of coal, the percentage of coal represented by the overage, compared with the quantity of coal checked into the barge?

A. You mean the totals?

Q. Yes? A. Yes, sir; about 6 per cent.

Q. Just indicate to the jury, if you will, Mr. Tidwell, what you mean by the total representing approximately 6 per cent?

A. There was laden in the barges from January 1, 1906, to November [341—287] 20, 1912, according to the books kept by Mr. Mills, 563,759 tons, 724 pounds; there was discharged from the barges during the same period 596,928 tons, 1266 pounds, a difference of 33,223 tons, 542 pounds, which was discharged from the barges more than had been laden therein;

(Testimony of W. H. Tidwell.)

the percentage is based upon the amount alleged to have been laden into the barges and the amount—the difference between the amount laden into them and the amount discharged, making a percentage on the totals of about 6 per cent, approximately 6 per cent.

Q. That is a 6 per cent overage?

A. A 6 per cent overage.

Q. Now, let me get at that in another way: You say there were checked into or laden upon these barges during the period of time you have referred to, 596,982 tons, 1266 pounds; is that correct?

A. That is true—no, that is not correct, Mr. Roche; there was laden on the barges 563,759 tons, 724 pounds, and there was discharged 596,982 tons, 1266 pounds.

Q. From what page are you reading, Mr. Tidwell?

A. Page 80 of Table C.

Q. According to your testimony, Mr. Tidwell, the total number of tons laden upon these barges or checked upon these barges, according to the books of the defendant Mills, between January 1, 1906, and November 20, 1912, would be 563,759 tons, 724 pounds?

A. That is true.

I have made myself familiar with the books, documents and records of the Western Fuel Company, which have been turned over to me, including the books kept by Mr. Mills. I have also made myself familiar with some of the records, the production of which depended upon the accuracy of the figures kept by Mr. Mills. The books kept by Mr. Mills showed the disposition [342—288] of all incoming

(Testimony of W. H. Tidwell.)

coal which was not laden upon the barges; in other words, of all the coal discharged from boats or vessels in which coal is imported at the port of San Francisco, the books being based upon the ascertained weight.

Q. In other words, simply to direct your attention to a concrete case for the purposes of illustration, if from the steamship "Thor" there would be discharged 5,000 tons, and that 5,000 tons would represent the ascertained weight, that is, the discharge or out-turn weight, even though the invoice or bill of lading weight might be much greater or in excess of that quantity of coal, or that weight of coal, the books kept by the defendant Mills would show what quantity of that coal was discharged into the yard of the Western Fuel Company, what portion of that coal went into the offshore bunker, and what portion of that coal was discharged into what is known as the inshore bunker, which would feed local distribution; that is correct, is it not?

A. That is true.

Q. And using that same case for the purpose of further illustration, if from that 5,000 tons of coal 2,500 tons would be discharged into the inshore bunker, 1,000 tons into the yard, and the remaining 1,500 tons into the offshore bunker, that would be the weight of the coal upon which duties would be paid to the United States Government? A. Yes, sir.

Q. These barges would draw their coal, ordinarily, would they not, from the offshore bunker?

A. Yes, sir, from the offshore bunker.

(Testimony of W. H. Tidwell.)

Q. You are familiar, are you not, with the records kept by Mr. Mills from time to time, showing, for instance, that a barge received a certain quantity of coal from a particular steamship, say the steamship "Thor"? A. Yes, sir. [343—289]

Q. Is it your understanding of the system that so far as that quantity of coal is concerned it would, after being weighed, be dumped into one of the compartments of the offshore bunker and go right through it into the barge?

A. It would be shot right through into the barge, according to my understanding of it.

Q. So, in that particular instance, instead of charging that particular quantity of coal into a compartment or a pocket of the offshore bunker, or to the offshore bunker, itself, it would be charged directly to the barge, itself, as though laden out of the ship on to the barge; is that correct?

A. That is my understanding.

* * * * *

Q. Is it not a fact, Mr. Tidwell, that according to the books kept by the defendant, Mills, 33,223 tons, 542 pounds more of coal was taken out of these barges than the quantity of coal upon which the United States Government collected import duties?

* * * * *

A. Yes, sir.

Q. And the 6 per cent to which you referred, or approximately the 6 per cent to which you referred, represents the excess coal, does it not, that is, the percentage of coal representing overage that was

(Testimony of W. H. Tidwell.)

checked out or discharged from these barges in excess of the amount of coal that was checked in?

A. That is true.

Q. That 6 per cent is based upon every ton of coal that, according to the books of the defendant Mills was checked into these barges during these years to which your attention has heretofore been directed?

A. On which there was an overage. [344-290]

Q. Upon which there was an average?

A. Yes, sir,

Q. It is the fact, is it not, Mr. Tidwell, that there was an overage practically in every instance?

A. Yes, sir.

Q. And it is also a fact, is it not, that at least in one instance there was an overage of some 70 per cent?

A. I think, correctly speaking, it is about 68 per cent.

(The witness' attention is here directed to "United States Exhibit No. 125, Table C.")

The dates over on the extreme left-hand side of Table C represents the cleanup of the barge, that is, when all of the coal that remains in the barge was taken out of it. In the next column, moving to the right, is the name of the barge. The names following the name of the barge represent vessels or places from which coal was received. For instance, page 1 of Table C, the first item is "Melrose"; that represents the name of the barge "Melrose." The name "Tellus" represents a ship from which the coal was taken which was laden into

(Testimony of W. H. Tidwell.)

the "Melrose." My understanding of that particular instance is that it is supposed to represent a case where the coal is taken out of the "Tellus" and discharged via one of the offshore pockets immediately upon the barge. The next column, under the word "debit," which showed the individual loading from the various ships under "tons and pounds" is inserted the total amount laden upon the barge. The figures in the next column represent the drawback entry number, and then comes the name of the vessels under the general designation "Vessel," which represents the vessel on which the coal was laden which got the benefit of the drawback. The figures appearing immediately to the right of the names of the vessels represent the quantity of coal laden upon or discharged into each of these vessels. Under the column entitled "Credit" where [345—291] "Tons and Pounds" appear, is placed the total. Under the next column "Without drawback" appears the coal upon which no drawback was claimed because of the character of the boat in which the coal was discharged. The next column, which is designated "With drawback," represents that portion of the coal which was discharged upon vessels upon which drawback claims were made and paid.

Q. Now, directing your attention to the second item appearing upon page 954 of the transcript in this case, which would be upon page 1 of the table or exhibit, the barge "Ruth," upon the barge "Ruth," a certain quantity of coal was laden; is not that true? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Just explain that item, if you will, please.

A. Under date of January 5, the barge "Ruth" received from the steamer "Turje Viking" 746 tons, 840 pounds.

Q. That quantity of coal represents the ascertained weight, does it?

A. It represents the amount laden on the barge, according to the books of Mr. Mills.

Q. And according to the ascertained weight?

A. Yes, sir.

Q. And the weights, according to his books, upon which duties were paid? A. Yes, sir.

Q. What became of that coal?

A. The 746 tons and 840 pounds were laden on the steamers "Korea," "City of Sydney," and "Peru"; the "Korea" receiving 139 tons, 841 pounds; the "City of Sydney" receiving 315 tons, 987 pounds, [346—291½] and the "Peru" receiving 392 tons and 1200 pounds, making a total of 847 tons, 794 pounds, or 100 tons, 2194 pounds more than were laden on the barge.

Q. In other words, although there were only 746 tons and 840 pounds checked in or laden upon that barge, there were discharged from that barge and laden upon these three ships, 847 tons, 794 pounds, or 100 tons, 2194 pounds in excess of the amount checked in; is that correct?

A. Yes, sir, that is correct.

Q. Upon what quantity of coal were drawbacks paid? A. On all of it.

Q. That is, on the entire coal laden into these

(Testimony of W. H. Tidwell.)

three ships, including the 100 tons overage; is that correct?

A. Yes, sir, paid on drawback entries 70, 75, and 77.

Q. By the way, what is that percentage of overage, approximately? A. About 13 per cent.

Q. About 13 per cent increase? A. Yes, sir.

Mr. ROCHE.—Q. I would like to have you look at this diary. Will you turn to the diary kept by the defendant Mills and to that entry; I want to find out over what period of time that barge took on that coal; in other words, for the purpose of determining within what period of time the coal was checked in or laden upon that barge, that it increased 13 per cent. You don't know, of your own knowledge, what the condition of the climate was here during that period?

A. No, I was not here at that time. It will be necessary to have the book of 1905, if that is the day of the cleanup.

Q. The date of 1906? A. I know.

Q. If the cleanup was 1906, it would start in at 1905? A. That is right.

Mr. KNIGHT.—You assume in your question that every time [347—292] there was an overage shown it was a cleanup of the barge.

Mr. ROCHE.—That is what I assume. Here is the last week in December, Mr. Tidwell.

A. On December 26, 1905, there was laden on the barge "Ruth" from the steamer "Turje Viking" 282 tons, 680 lbs. The same amount is shown on

(Testimony of W. H. Tidwell.)

December 27. The same amount is shown on December 28, the same on December 29. On December 30th there was laden on to the barge "Ruth" 746 tons, 840 lbs.

Q. Now, just a minute, Mr. Tidwell. When you say there was laden upon the barge "Ruth," do you mean that on that date that represents the total number of tons which had been laden on her up to that date?

A. The total amount up to that date, yes. That was all that was laden on the barge "Ruth" from the steamer "Turje Viking."

Q. In other words, that 746 tons, 840 lbs. to which you have just referred includes these various amounts to which you have heretofore testified to as having been laden upon the barge from and including December 26th to and including December 30th; is that correct? A. Yes.

Q. So that that quantity was being deposited upon that barge during six days; that is, from and including the 26th of December to and including the 30th—I mean five days? A. Five days.

Q. Now, when did she first commence to discharge?

A. On December 27th she discharged in the steamer "Korea" 139 tons, 840 lbs.

Q. That would be the first entry appearing in your "Exhibit C" relating to that item.

A. Steamer "Korea," yes; 139 tons, 840 lbs. On December 29th she discharged into the "City of Sidney" 135 tons, 2060 lbs. She continued to dis-

(Testimony of W. H. Tidwell.)

charge into the "City of Sidney," and on December 30th it [348—293] shows that she had discharged 315 tons, 987 lbs.

Q. That represents, of course, the second item contained in these entries appearing upon page 1 of Table C? A. 315—987.

Q. That makes the total quantity of coal discharged upon that occasion from the barge "Ruth" into the "City of Sidney." A. Yes.

Q. Now, when did she continue to discharge?

A. She continued to discharge on January 4th; she discharged into the steamer "Peru" 116 tons, 1666 lbs.

Q. And on the 5th?

A. On the 5th into the "Peru," a total on the 5th —into the "Peru," making a total of 392 tons, 1206 lbs.

Q. Does the book itself kept by the defendant Mills show the quantity of coal discharged from that barge upon that occasion in excess of the amount checked in or laden upon the barge? A. It does.

Q. What do the figures show, kept by Mr. Mills?

A. It is all on December 5th, the whole thing is itemized here, showing that the barge "Ruth" received from the steamer "Turje Viking," voyage No. 4, 746 tons, 840 lbs.; that she discharged into the steamer "Korea," 139 tons, 841 lbs.; the "City of Sidney," 315 tons, 987 lbs.; the "Peru," 392 tons, 1206 lbs., making a total of 847 tons, 794 lbs., or 100 tons, 2195 lbs. more than she had in her.

The COURT.—The answer to your question is

(Testimony of W. H. Tidwell.)

that all this occurred between the 26th of December and the 6th of January?

Mr. ROCHE.—Yes.

* * * * *

[349—294]

Q. Directing your attention to the question of overage, so far as this item is concerned, it is true, is it not, that the overage of 100 tons, 2194 lbs. is indicated in this book kept by the defendant Mills, in the following language and figures: "Over 100—2194."

Mr. McCUTCHEON.—I suggest, if your Honor please, in the interest of saving time,—if they think it proper to consume time, of course, we have no objection—the witness has already stated that in every instance where there is an overage the books of Mr. Mills indicate that overage which is also stated in the total overages cast up by the witness from these books. That has been stated two or three times. It seems to me it is a waste of time to continue to harp on that before the jury.

Mr. ROCHE.—If your Honor please, counsel on the other side are always endeavoring to interject into this case a false quantity, and that is the percentage that these overages bear to the total volume or quantity of business done by the defendants, and, of course, upon that theory a man could commit a fraud against the Government continuously during one month, and if he had not done anything of that kind before that date, he could come before a jury and say that the quantity of overage during this

(Testimony of W. H. Tidwell.)

one month during which I did commit frauds were so small as compared with my good faith extending over a long period of years that I ought not to be convicted of a criminal offense. We desire to have the jury understand the particular overages with reference to the particular cases for the purpose of demonstration.

Mr. MOORE.—Counsel has made an argument and we would like to be accorded the privilege of responding briefly. We resent the imputation that percentages have no bearing in this [350—295] matter. They simply confine themselves to showing 20,000 tons, as being the difference we will say, between the invoice weights down in this harbor of the imported coal and the custom-house weights. We think that a fair and honest table would have included, and a full and fair examination as to that matter would have included the proposition that that only amounts to nine-tenths of one per cent, because we think when the jury sees that this only amounts to nine-tenths of one per cent on the volume of business transacted by the company, it will appear at once ridiculous and absurd that there was any conspiracy involved in connection with it at all. And just so with respect to the matter of these drawbacks as to which we do not believe any examination has yet been had that puts the situation completely before this jury, where you are going back over a period of six years relating to the importation of over 2,000,000 tons of coal weighed upon one method upon its arrival here, weighed and sold by

(Testimony of W. H. Tidwell.)

another method, so far as a small proportion of it is concerned, amounting to less than one-fifth of the total amount of coal that is consigned from the vessels, when they can only by adding up the six years in a case where one million dollars and over of duty has been paid by this company, they can only figure out of the difference in weight made and conducted by the Government officials of the United States themselves, and without any control or connection upon the part of this company, only an item of \$12,000, which was not collected by this company at all, but was collected by another company which in order to get 45 or 50 cents per ton for the duty had to pay six or \$7.00 per ton for the coal; that when the slight percentage of \$12,000 in that million dollars, is concerned, running, as it does, over a course of business extending— [351—296]

The COURT. (Intg.) There is no occasion to prolong this argument.

* * * * *

Mr. ROCHE.—Q. Will you turn to Exhibit "C" again, Mr. Tidwell; I would like to have you turn to an entry appearing during the month of December, 1911—December 4, 1911, is my recollection of it, that the barge cleared. A. Page 67 of Exhibit "C."

Q. I think it is well at this time, where we are paying attention to percentages, to direct attention to this item.

Mr. McCUTCHEON.—You mean the "Comanche"?

The WITNESS.—December 4th, the "Comanche."

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Q. Will you refer to that item, Mr. Tidwell? A. This was December 4th.

Q. Yes, that is the one; it is the "Comanche," December 4th. Will you read that item to the jury?

A. December 4, 1911, barge "Comanche"; the barge "Comanche" received from the steamship "Thor" 302 tons, 579 lbs.; the offshore bunkers, 96 tons, 1760 lbs.; the offshore bunkers, 24 tons, 390 lbs.; the steamer, or the vessel, rather, "James Smith," 212 tons, 1160 lbs., and the offshore bunkers, 90 tons, making a total of 725 tons, 1649 lbs.

Q. That was the coal checked in upon the barge; is that correct? A. Yes.

Q. And that was upon ascertained weight, the weight upon which the Western Fuel Company paid to the United States Government import duty?

A. Yes.

Q. What became of that coal?

A. That was laden upon the vessel "J. N. Luckenbach"; 100 tons, 565 lbs.; the steamer "Kansas City," 345 tons, 1692 lbs.; the steamer "Shinyo Maru," 798 tons, 1770 lbs., making a total of [352—297] 1244 tons, 1766 lbs., or 519 tons, 117 lbs. more than she had on her.

Q. In other words, the coal laden, checked into that barge was 725 tons, 1649 lbs., and the amount checked out of her or discharged out of her exceeded that tonnage by 519 tons, 117 lbs.? A. Yes.

Q. According to the books of Mr. Mills?

A. Yes.

Q. What percentage would that overage repre-

(Testimony of W. H. Tidwell.)

sent? A. Approximately 68 per cent.

* * * * *

Q. There was some question raised this morning as to whether all of the coal upon which drawbacks had been paid had been accounted for, or whether upon all of the excess coal or any part of the excess coal any import duties had been paid. I want to direct your attention to another one of these daily sheets including the discharge report produced here by the defendants, signed by E. Mayer, and covering the discharge of the steamship "Thor" in the month of July, 1910, being an exhibit which as yet has not been testified to. You have seen that exhibit before, have you not?

A. I have.

Q. Now, I direct your attention to a diary kept by the defendant Mills during the year 1910, and ask you to look at that diary, and particularly the dates in the month of July, 1910, for the purpose of ascertaining whether the figures contained in those daily reports are similar in kind to the figures contained in that diary.

A. Now, you refer to the daily sheets or the summary?

Q. Yes. Will you mark that, please, Mr. Clerk, as an exhibit? That will be "U. S. Exhibit No. 128 for identification." [353—298]

The COURT.—Is it in evidence already?

Mr. ROCHE.—This one is not yet in evidence, your Honor. I suppose, Mr. McCutchen, you will concede, will you not, that all of the data and figures contained upon this exhibit now marked "U. S. Ex-

(Testimony of W. H. Tidwell.)

hibit No. 128 for identification" are in the handwriting of the defendant Mayer?

Mr. McCUTCHEON.—Well, subject to correction.

Mr. ROCHE.—It represents the daily report in reference to the discharge of the steamship "Thor" on that voyage and likewise contains a summary sheet.

Mr. McCUTCHEON.—We will admit that subject to correction.

Mr. ROCHE.—All right.

Q. Can you find upon that record kept by the defendant Mills the day upon which the steamship "Thor" was first discharged or the date upon which coal was first taken out of her?

A. Under the date of July 21, 1910, appears the name of the steamship "Thor" having discharged 224 tons, 2170 lbs. in the yard bunker; the same day 113 tons, 1920 lbs. into the barge "Ruth," showing a total discharge of 338 tons, 1830 lbs. on that particular day.

Mr. ROCHE.—Now, I read to the jury a part of this exhibit already offered in evidence indicating or rather showing the daily report of the discharge of the steamship "Thor" on July 21, 1910. Total coal discharged—I won't read the different hoists—338 tons, 1830 lbs. To yard bunkers, 224 tons, 170 lbs.; to barge "Ruth," 113 tons, 1920 lbs. Total, 338 tons, 1830 lbs. Those figures, Mr. Tidwell, correspond, do they not, with the figures to which you have just testified? A. They do. [354—299]

Q. Now, turn to the second day's discharge, July 22d?

(Testimony of W. H. Tidwell.)

A. On Friday, July 22nd, 168 tons, 1570 lbs. to the wharf bunkers; 1100 tons, 460 lbs. to the yard bunkers; 17 tons, 140 lbs. to the offshore bunkers; 452 tons, 2090 lbs. to barge "Ruth," showing a total discharge up to that time of 1738 tons, 2020 lbs.

Q. Now, the figures which you have just given me are totaled—in other words, they include the discharge to date. A. The total of the two days.

Q. In other words, the system pursued by Mr. Mills so far as these entries are concerned is substantially this: If 270 tons were discharged, we will say, to the barge "Ruth," we will say on July 21st, 1910, that, of course, would appear in that book, being the first amount of coal laden upon that barge discharged from the steamship "Thor"; if upon the second day another 270 tons of coal was discharged from that steamship and laden upon the barge "Ruth," the second day would simply give the totals and show that 500 tons up to that time had been laden on that barge; is that correct? A. Yes.

Q. Now, I read in evidence to the jury, the daily report of the second day's discharge of the steamship "Thor." July 22d, 1910; total coal discharged on that day, 1400 tons, 190 lbs. To wharf bunkers, 168 tons, 1570 lbs.; yard bunker, 875 tons, 550 lbs.; to barge "Ruth," 339 tons, 170 lbs.; to offshore bunker, 17 tons, 140 lbs. The total figures being as follows: discharged—this will be to date—1738 tons, 2020 lbs. The total figures here correspond with the figures which you had just read? A. They do.

Q. Will you turn now to the next date of discharge? [355—300]

(Testimony of W. H. Tidwell.)

A. Saturday, July 23d, 418 tons and 60 lbs. to the wharf bunkers; 1935 tons, 2160 lbs. to the yard bunkers; 374 tons, 1800 lbs. to offshore bunkers; 452 tons, 2090 lbs. to the barge "Ruth," making a total discharge up to this date of 3181 tons, 1630 lbs.

Q. That is the total discharge, 3180 tons, 1630 lbs.

A. Yes.

Q. As a matter of fact no coal was laden into the barge "Ruth" upon that date, the total figures, so far as the "Ruth" being concerned or is concerned, being carried over from the preceding day.

A. The same as of July 22d.

Q. Now, I read to the jury daily report of July 23d, 1910. Total coal discharged, that is, on that date, from the four hatches, 1442 tons, 1850 lbs. To wharf bunkers, 249 tons, 730 lbs.; yard bunkers, 835 tons, 1700 lbs.; to offshore bunkers, 377 tons, 1660 lbs., making a total discharge on that date of 1442 tons, 1850 lbs., and making a total discharge of coal to that date, to and including that date, of 3180 tons, 1630 lbs.

The WITNESS.—That corresponds to the amount shown in the book.

Q. Will you turn to the next day in that diary?

A. The next day, Monday, July 25, 1910, 541 tons, 1360 lbs. to the wharf bunkers; 2889 tons, 340 lbs. to the wharf bunkers; 554 tons, 1240 lbs. offshore bunkers; 452 tons, 2090 lbs. to the barge "Ruth," a total of 4638 tons, 550 lbs. total to that date.

Q. How many tons total to that date?

A. 4638 tons, 550 lbs.

(Testimony of W. H. Tidwell.)

Q. It is a fact, is it not, Mr. Tidwell, that even up to and [356—301] including that date, no additional coal had been discharged upon the barge "Ruth," but that the total discharge shown upon July 22d has been carried forward to the 25th?

A. Yes. I believe it is July 22d—yes, it is July 22d.

Q. Now, I will read in evidence the report for July 25, 1910, showing the discharge of coal upon that date and the total discharge to that date. July 25, 1910, to wharf bunkers, 123 tons, 13 lbs.; to yard bunkers, 953 tons, 420 lbs.; to offshore bunkers, 375 tons, 1680 lbs.; total coal discharged on that date, 1456 tons, 1160 lbs., making a total of coal discharged to that date and inclusive of July 25th, 1910, 4638 tons, 550 lbs.

The WITNESS.—This total corresponds to that amount.

Q. I call your attention to July 26th. That is the last date of discharge, is it not?

A. Yes, it is the last day of discharge; 1238 tons, 870 lbs. discharged into wharf bunkers; 2889 tons, 340 lbs. into the yard bunkers; 882 tons, 40 lbs. into the offshore bunkers; 450 tons, 2090 lbs. into the barge "Ruth," making a total discharge of 5462 tons, 1080 lbs. A memorandum also appears, "Gone to Oakland at 1-15 P. M."

Q. Now, it is a fact, is it not, Mr. Tidwell, that the coal discharged on, all of the coal discharged on the 26th of July, 1910, was either discharged into the wharf bunkers or into the offshore bunkers?

(Testimony of W. H. Tidwell.)

A. According to the records.

Q. In other words, you can tell that by comparing the figures upon that date with the figures appearing in the diary on the preceding day; that is correct, is it not? A. Yes, it is.

Q. I will read in evidence the daily report for July 26, 1910 [357—302] showing the discharge from the steamship on that date; to wharf bunkers, 696 tons, 1130 lbs.; to offshore bunkers, 127 tons, 1040 lbs.; total coal discharged that day, 824 tons, 530 lbs. At the lower left-hand corner of this sheet the following is contained: invoice, 7359 tons. That is the invoice and bill of lading weight; isn't that correct?

A. Yes; that is not shown on here.

Q. The invoice weight is not shown in that book?

A. No.

Q. Discharged, 5462 tons, 1080 lbs., balance, 1896 tons, 1160 lbs. Now, that represents the supposed balance of coal on that boat at the time she finished discharging in San Francisco and proceeded as Mr. Mill's book would indicate, to the Oakland bunkers?

A. To Oakland.

Q. And that balance is ascertained by deducting the actual discharge according to the out-turn weights from the invoice or bill of lading weight? A. Yes.

Q. Let me ask you this question, Mr. Tidwell—is or is not it a fact that for every lb., that is, within 10 lbs. of coal discharged at the San Francisco port according to the out-turn weights the coal is fully accounted for?

A. Pardon me just a moment, I do not understand.

(Testimony of W. H. Tidwell.)

Q. Let me put the question in a different form. According to the record which you have in your hand, 5462 tons, 1080 lbs. of coal were taken out of this steamship "Thor" according to the out-turn weight?

A. Yes.

Q. Is or is not it a fact that all of that coal is accounted for? A. Yes.

Q. And the various places in which that coal was finally deposited is likewise accounted for? [358—303]

A. Yes; there is another item on the "Thor" which you have not noted there.

Q. What is that item?

A. It shows the "Thor" again showing the same amount shown in the total here except 1780 tons, 130 lbs. discharged in Oakland, making a total of 7243 tons, 1610 lbs. discharged from the ship; also showing a shortage of 116 tons, 630 lbs.

Q. That is a shortage on the entire cargo?

A. On the entire cargo.

Q. That shortage representing the out-turn weight deducted from the invoice or bill of lading weight?

A. Yes.

Q. Will you turn to Exhibit "A," please, for just a moment? I intend to do this in only this instance, I believe, for the purpose of determining the accuracy of these tables, and find the discharge of that steamship "Thor" in Table A. That table there, as you have already testified, was compiled from the invoice and bill of lading weights and also the out-turn weights. A. On page 27.

(Testimony of W. H. Tidwell.)

Q. Of Table A.

A. The Table A, in the month of July, the second item, invoice weights, 7359 tons, ascertained weight 7242 tons, 1610 lbs.; short 116 tons, 630 lbs.

Q. Does the shortage which appears to have occurred as shown by the figures in Table A compare exactly with the shortage shown in the book of the defendant Mills?

A. It is short, 116 tons, 630 lbs.

Q. Now, then, as I understand your testimony, after leaving San Francisco the boat went over to Oakland and completed her discharge.

A. This record shows on this page in red ink, "Gone to Oakland at 1:15 P. M." Over on the other page it says, "1780 tons, 130 lbs. were discharged in Oakland." [359—304]

Q. The out-turn weights representing that part of the cargo discharged in Oakland plus the out-turn weight representing that part of the cargo discharged in San Francisco would give the total out-turn weight of the boat, would it not? A. Yes.

Q. And the difference between the total out-turn weight and the invoice weight represents the shortage to which you have testified, and which appears on Table A, Exhibit 125, and likewise the book of the defendant Mills? A. That is true.

Mr. ROCHE.—I would like to read the summary-sheets of this steamer "Thor," likewise, for the purpose of showing the disposition of all the coal weighed out of her. July, 1910, summary of North Wellington coal discharged ex—"Thor," Folsom street wharf.

(Testimony of W. H. Tidwell.)

I am just going to read the totals here, Mr. McCutchen. "1910, July 21, 113 tons, 1920 lbs., laden into the barge "Ruth"; July 22d, 17 tons, 140 lbs., discharged into the offshore bunkers; 339 tons, 170 lbs., laden into the barge "Ruth"; July 23, 357 tons, 1660 lbs. into the offshore bunkers; July 25, 379 tons, 1680 lbs. into the offshore bunkers; July 26, 127 tons, 1040 lbs. discharged into the offshore bunkers." In addition to that the sheet shows the following totals: Total discharged into the barge "Ruth" and offshore bunkers 1334 tons, 2130 lbs.; into the yard bunkers, 2889 tons, 340 lbs. Under the designation "bunkers" here, 1238 tons, 850 lbs., which indicates the yard—Mr. Tidwell, I will just call your attention to this summary here, under the word "bunkers" where it alone appears, that means into the yard, does it not?

A. Yes, I think we can determine that definitely by the books [360—305] here. What is the amount there?

Q. The total is 1238 tons.

A. It is the wharf bunkers, the inshore bunkers.

Q. And the yard bunkers would be 2889 tons, 340 lbs.? A. Yes.

Mr. ROCHE.—Then change it, discharged into the yard itself, 2889 tons, 340 lbs.; into the inshore bunkers or yard bunkers 1238 tons, 850 lbs., making a total discharge of 5462 tons, 1080 lbs.

* * * * *

Q. Now, will you refer to Exhibit "C," please, Mr. Tidwell. I want to call your attention to some of the overages there for the purpose of directing them to

(Testimony of W. H. Tidwell.)

the attention of the jury, and likewise for the purpose of indicating in a general way the percentage of overages as based upon the total quantity of coal checked or discharged into the barge. * * * Table C, which you have in your hand, shows, as you have already testified, that a portion of the coal discharged from the barge upon which drawbacks were claimed, as well as that portion of the coal upon which there were no drawbacks claimed because the coal was not laden into an American vessel foreign bound; that is so, is it not? A. Yes, sir.

Q. Now, directing your attention to page 2, the first entry appearing upon page 2, the barge "Theobold," will you just indicate to the jury the coal that was checked into that barge, the coal checked out, and upon what vessels the coal was laden, and likewise the overage, if any?

A. The date is January 31, 1906, the barge "Theobold" received from the steamer "Tellus" 1114 tons, 480 pounds; the vessel "Torje Viking" 410 tons, 1100 pounds, making a total of 1524 tons, 1580 [361—306] pounds. There was discharged from the barge "Theobold" into the "Sierra" 951 tons, 91 pounds; the steamship "Mongolia" 717 tons, 1515 pounds, making a total of 1668 tons, 1606 pounds discharged, which was 144 tons and 26 pounds more than was laden on the barge.

Q. That percentage is approximately what?

A. Approximately nine per cent.

Q. About nine per cent overage? A. Yes, sir.

Q. Can you state whether upon any part of that

(Testimony of W. H. Tidwell.)

coal thus laden originally into the barge "Theobold" and afterward discharged into the steamship "Sierra" and into the steamship "Mongolia," drawback claims were made?

A. A drawback claim was made for the 951 tons discharged into the "Sierra," on Drawback Entry No. 83, and in the "Mongolia" the drawback entries are numbered 87 and 89.

Q. It is a fact, is it not, Mr. Tidwell, that the United States Government returned to the owners of the two steamships, the "Sierra" and the "Mongolia," customs duties upon all of that coal, including the 144 tons and 26 pounds overage; is that correct?

A. Yes, sir.

* * * * *

Q. Now, I direct your attention to the last item appearing on that page.

A. February 10, the barge "Nanaimo" received from the steamship "Titania" 366 tons, 590 pounds, and there was laden on the steamship "China" 480 tons 436 pounds, and on the track, 5 tons, 1620 pounds, making a total discharge from the barge of 485 tons, 2056 pounds, or 119 tons 1466 pounds more than was laden on the barge.

Q. In other words, although there were laden upon the barge originally only 366 tons, 590 pounds, there were checked out of [362—307] that barge, and laden upon the two steamers, 119 tons, 1466 pounds in excess of the 366 tons, 590 pounds; is that correct?

A. Yes, sir.

Q. And that percentage is approximately what?

A. Approximately 11.

(Testimony of W. H. Tidwell.)

Q. What is that? A. Excuse me, that is wrong.

Q. It is nearer to 40, is it not? A. It is about 38.

Q. I would like to have you look at the diary kept by the defendant Mills, for the purpose of ascertaining, if you can tell from that book, what period of time that coal remained on that barge?

A. It appears to have been placed on the barge "Nanaimo," 366 tons, 590 pounds, on Saturday, February 3d, and was finally checked out on the 10th.

Mr. KNIGHT.—What year is that, Mr. Roche?

Mr. ROCHE.—1906.

Q. So that the coal was on the barge for approximately a week, according to these records?

A. Yes, sir.

Q. Now, going back for a moment to your Table C, I will ask you to look at that table and state what portion or quantity of the coal thus discharged from that barge was laden into an American bottom foreign bound, upon which a drawback claim was made?

A. 480 tons, 436 pounds were laden into the steamship "China," and the drawback claimed on drawback entries No. 93 and 96.

* * * * *

Q. The situation, so far as this item is concerned, Mr. Tidwell, is that there were 366 tons, 590 pounds laden into the barge, and that amount plus 119 tons, 1466 pounds more checked out? A. Yes, sir.

Q. And that percentage is approximately what?

[363—308]

A. 38 per cent approximately.

* * * * *

Q. Just read the next entry, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. The barge "Ludlow," under date of March 5, received from the vessel "Otto" 633 tons, 10 pounds; from the bunkers, 158 tons, 1560 pounds; making a total received of 791 tons, 1570 pounds; and discharged into the steamship "Ventura" 850 tons, 698 pounds, or 58 tons, 1368 pounds more than was laden on the barge.

Q. Was there any claim made by any person or corporation for the return to him or to it of the duties paid upon that coal?

A. Yes, sir. Drawback Entries Nos. 102 and 103 were filed for the total amount of coal laden on the steamship "Ventura," which included the 58 tons overage.

Q. Those drawback claims were based upon the entire quantity of coal checked out? A. Yes, sir.

Q. Including the overage of 58 tons, 1368 pounds; is that correct? A. Yes, sir.

Q. Now, I direct your attention to the item appearing upon the top of the succeeding page, page 4, and ask you to explain that item to the jury?

A. Under date of March 17, 1906, the barge "Melrose" received from the "Tellus" 969 tons, 670 pounds; the offshore bunkers, 47 tons 1070 pounds; the "Otto" 641 tons 1230 pounds, or a total of 1658 tons, 730 pounds; and discharged into the steamship "Doric" 549 tons, 87 pounds; into the steamship "Manchuria" 131 tons, 1466 pounds; into the steamship "Korea" 1160 tons, 2091 pounds, making a total discharge of 1841 tons, 1404 pounds, or 183 tons 647 pounds more than was laden on the barge.

Q. In other words, there were 183 tons, 647 pounds

(Testimony of W. H. Tidwell.)

taken off the barge more than was checked into it; is that correct? [364—309] A. Yes, sir.

Q. And that excess or overage represents what percentage of the quantity of coal laden into the barge?

A. About 11 per cent.

Q. Were there drawback claims interposed for any part of that cargo?

A. A drawback was claimed for the amount laden on the steamship "Manchuria," on drawback entry 100; and on the "Korea" on drawback entries 106 and 108.

Q. And paid by the Government?

A. And paid by the Government. The steamship "Doric" was under the English flag, and drawback was not paid.

Q. Will you turn to page 7 of Table C? Directing your attention to the first entry upon that page, the barge "Energy," I wish you would state what it shows?

A. Under date of May 12, 1906, the barge "Energy" appears to have received from the vessel "Torje Viking," 344 tons, 200 pounds, and discharged into the "City of Para," 310 tons, 125 pounds; and into the steamship "Doric" 68 tons, 800 pounds, or a total of 378 tons, 925 pounds, or 34 tons, 725 pounds more than was laden on the barge.

Q. That is 34 tons and 725 pounds plus the 344 tons and 200 pounds deposited; is that correct?

A. Yes, sir; making 378 tons, 925 pounds.

Q. What would be the percentage of overage in that instance? A. About ten per cent.

(Testimony of W. H. Tidwell.)

Q. And was there a drawback claim interposed for any part of that cargo, including the excess cargo?

A. A drawback was claimed. * * * A drawback was claimed on the amount laden on the "City of Para," in drawback entry No. 125. [365—310]

Q. And paid by the Government?

A. The amount was paid by the Government.

Q. On the same page, directing your attention, again, to the barge "Ludlow," I wish you would read what it shows?

A. On May 22d, the barge "Ludlow" received from the "Torje Viking" 683 tons, 150 pounds, and from the steamer "Tellus" 645 tons 1910 pounds, or a total of 1328 tons, 2060 pounds; and discharged into the steamer "Doric" 266 tons, 1535 pounds; into the "City of Sydney," 253 tons 259 pounds; the "Burnside," an Army transport, 350 tons, 1980 pounds; and into the "Logan," also a transport, 586 tons 64 pounds, making a total discharge of 1456 tons, 1598 pounds, or 127 tons, 1778 pounds more than was laden on the barge.

Q. That is, the amount laden on the barge being 1328 tons, 2060 pounds, there was an overage of 127 tons, 1778 pounds? A. Yes, sir.

Q. Or a percentage of what, approximately?

A. About 9 per cent.

Q. I direct your attention to an item appearing upon page 11 of this table, under date of September 14th. I wish you would read that.

A. The barge "Ruth"—

Q. (Intg.) Let me put the question to you in this way, Mr. Tidwell: That item shows, does it not, that

(Testimony of W. H. Tidwell.)

upon the barge "Ruth" there was laden from the off-shore bunkers, in four loads, 1256 tons, 140 pounds; is that correct?

A. No, it is 1288 tons, 140 pounds.

Q. Yes, I guess that is the number. It also shows that 681 tons 1260 pounds were laden upon the steamer "Sierra" and 738 tons, 681 pounds laden upon the steamship "Siberia," making a total discharge of 1419 tons, 1941 pounds, the overage being [366—311] 131 tons, 1801 pounds; is that correct?

A. Yes, sir.

Q. What percentage does that represent?

A. About 11 per cent.

Q. About 11 per cent of the total amount of coal laden upon that barge? A. Yes, sir.

Q. Can you state whether, for the return of the import duties, any claim was made, and if so, for what part of that coal, if for less than the whole of it?

A. Drawback Entry No. 20 was filed for 681 tons, 1260 pounds laden on the "Sierra"; and drawback entry No. 25 for 738 tons, 681 pounds for the coal laden on the "Siberia," both of which were paid.

Q. In other words, drawback claims were made covering the whole of the weight of the coal discharged from that barge? A. Yes, sir.

Q. Is that correct, including the excess?

A. That is correct.

* * * * *

Q. It is a fact, nevertheless, that claims were presented and paid by the Government for all of that coal? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Now, I want to direct your attention to another item appearing on the same page, under date of September 25, referring to the barge "Comanche."

A. The barge "Comanche" received from the yard 365 tons, 1810 pounds; offshore bunkers, 66 tons 640 pounds, making a total of 432 tons, 210 pounds; and discharged into the steamship "Aztec" 100 tons, 865 pounds; into the "City of Sydney," 385 tons, 1360 pounds, making a total discharge of 485 tons, 2225 pounds, or 53 tons, 2015 pounds more than was laden on the barge. [367—312]

Q. That would be a percentage of what?

A. About 11 per cent.

Q. Now, I want to call your attention to a part of that item; it is a fact, is it not, that according to the records of the Western Fuel Company, and, in fact, according to the books kept by Mr. Mills, 365 tons, 1810 pounds came from the yard of the Western Fuel Company? A. Yes, sir.

* * * * *

[Testimony of D. C. Norcross, for the Government
(Recalled).]

D. C. NORCROSS, a witness recalled for the United States, testified as follows:

Direct Examination by Mr. ROCHE.

According to my understanding it is not a fact that all of the coal taken from the yard of the Western Fuel Company would be weighed before it would leave the premises. At times coal is taken from the yards to the barges without being weighed. I was never present on an occasion when that occurred.

**[Testimony of W. H. Tidwell, for the Government
(Recalled).]**

W. H. TIDWELL, recalled for the United States, resumed his testimony as follows:

Direct Examination by Mr. ROCHE.

Mr. ROCHE.—Q. As I understand it, Mr. Tidwell, 365 tons, 1810 pounds, constituting the quantity of coal that was put into these vessels according to the records kept by the defendant Mills, did come from the yard. A. That is true.

Q. Now, I direct your attention to the first item appearing upon the top of page 12 of Table C, the barge "Theobold"; will you [368—313] please read that?

A. Under date of October 4, 1906, the barge "Theobold" appears to have received from the steamer "Torje Viking" 1052 tons, 1740 pounds, and to have discharged into the steamer "Sonoma" 1134 tons, 1297 pounds, or 81 tons, 1797 pounds more than had been laden on the barge.

Q. Was there any drawback claim made against the Government for the return of the import duty?

A. A drawback claim was made on Drawback Entry No. 30 for the entire amount which was laden on the vessel.

Q. Including the overage of 81 tons; is that correct? A. Yes, sir.

Mr. McCUTCHEON.—If it were for the entire amount, Mr. Roche, and the entire amount included the overage, then it must have included the overage; why the necessity of repeating that all the time?

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Well, I am glad that you will admit something, Mr. McCutchen, and I suppose you will also admit that it was paid by the Government?

Mr. McCUTCHEN.—I will, if you state it to be the fact, subject to correction.

Mr. ROCHE.—I understand it to be the fact.

Q. Are the sheets which you now hold in your hand a reproduction of the figures of the defendant, Mills, in so far as they relate to the discharge of one steamship and the distribution of the coal into the offshore bunkers and into the barges? A. Yes, sir.

Q. I would like to have you take those sheets, Mr. Tidwell, and explain those entries to the jury. Will you please turn to that part of the diary in which those entries appear?

* * * * *

[369—314]

A. Yes, I have it; it is January.

Q. To what does the entry relate?

A. It is of date January 27, 1911, and refers to the discharge of the steamship "Thor."

Q. Now, just go right ahead. Now, as I understand it, those sheets are substantially and in fact a reproduction of the entries of the defendant Mills, with relation to the discharge of that cargo, and the distribution of the coal contained in that cargo; that is correct, is it not? A. Yes, sir.

Mr. McCUTCHEN.—Do I understand that they are simply a copy of the record?

Mr. ROCHE.—That is all; simply a copy of the record, itself. I want him to explain it to the jury,

(Testimony of W. H. Tidwell.)

so that the jurors can see the entries at the time the explanation is made, as to just exactly what the entries of the defendant Mills show.

A. As this appears in the books, the date is January 27, 1911; the steamship "Thor" discharged into the wharf bunkers 245 tons, 1070 pounds; into the yard bunkers 63 tons, 1280 pounds; into the barge "Ruth" 106 tons, 370 pounds, making a total discharge for this particular period of 415 tons, 480 pounds. On Saturday, the 28th and 29th, she discharged the difference between this and this amount, making a total on that particular day of 632 tons, 1220 pounds to the wharf bunkers.

Q. In other words, that is one of the totals to which you referred when you were being examined concerning the entries in Mr. Mill's books? A. Yes, sir.

Q. Instead of showing the separate amounts discharged each day, you would add the quantity of coal on the previous date or dates, and simply carry forward the total?

A. Yes, sir. The amount discharged on these dates was added to this amount, making the total on those three days. [370—315]

Q. In other words, to get the quantity discharged on Saturday the 21st, you would have to deduct the quantity shown by the entries to have been previously discharged from the figures appearing on that date?

A. Yes, sir; that amount would be shown by the discharge sheets kept by the Western Fuel Company; the daily discharge. 688 tons, 240 pounds discharged into the yard; 289 tons, 2010 pounds into the off bunkers; 195 tons, 1410 pounds into the barge "Ruth,"

(Testimony of W. H. Tidwell.)

making a total discharge up to this date, and including this date, of 1806 tons, 400 pounds. The barge "Ruth," it would be shown, received on the 28th and 29th.

Mr. McCUTCHEON.—Q. Just a moment: What do you mean by saying, "It will be shown"?

A. By this record here.

Mr. McCUTCHEON.—I understood this witness was simply taking the record as it was, Mr. Roche.

Mr. ROCHE.—He is explaining the record, Mr. McCutchen.

Q. Let me ask you this: I notice that no entry appears on this side of the sheet representing the first date of discharge; will you explain to the jury what that indicates, if anything?

A. We have only treated with the vessel "Thor"; there may be an entry on the books on this particular date, but it would not relate to the discharge of any coal with reference to the steamer "Thor," and consequently it was not used; the barge "Ruth" received from the offshore bunkers on Saturday, the 28th and 29th, which I suppose, I don't know what 29th means, but that is the way the record shows it, 558 tons, 1970 pounds; offshore bunkers again, 600 tons, 60 pounds; again, from the offshore bunkers, 56 tons, 240 pounds; and from the steamship "Thor," 195 tons, 1410 pounds, as shown by the record, here. She discharged into the steamship "Peru" 275 tons, 1062 pounds; the steamer "San Jose" [371—316] 317 tons, 222 pounds; the "City of Para," 184 tons, 840 pounds, or a total discharge of 776 tons, 2124 pounds,

(Testimony of W. H. Tidwell.)

leaving a balance in the barge "Ruth" of 39 tons, 1556 pounds.

Q. That is, at the close of that date; is that correct?

A. At the close of that date; yes, sir.

Q. Now, go ahead and explain the second sheet. That represents the continuation of the daily entries from what are shown upon the first sheet?

A. Yes, sir, January 30th; on January 30th, and including the other dates, there was discharged into the wharf bunkers 737 tons, 1860 pounds; the yard bunkers, 839 tons, 1760 pounds; offshore bunkers, 369 tons, 920 pounds; the barge "Ruth," 195 tons, 1410 pounds; making a total discharge up to and including this date of 2142 tons, 1470 pounds. This was taken up from the other sheet and I believe was brought forward, if my memory serves me correctly; yes, it was brought forward.

Q. That is, that represents the total coal laden upon the barge, without having made any deduction from the quantities previously discharged?

A. Yes, sir.

Q. And on this particular date, she again discharged, did she?

A. Yes, sir; she discharged into the "City of Para" the difference between 184 tons, 840 pounds and 290 tons, 1432 pounds, or a total discharge from the barge during that period of 883 tons, 476 pounds, making an overage of 66 tons, 1276 pounds more than was laden on the barge.

* * * * *

Q. Just proceed, now, Mr. Tidwell.

(Testimony of W. H. Tidwell.)

A. I think we have finished with this one, showing this barge to be 66 tons, 1276 pounds over.

Q. So that there will not be any misunderstanding between us, [372—317] and so that counsel on the other side of this case will understand our attitude, it is true that the 66 tons, 1276 pounds, overage, represents the overage existing upon that barge between the date of the previous cleanup and the date of this cleanup, to wit, January 30, 1911. A. Yes, sir.

Q. And, of course, there is some coal taken into consideration in figuring that overage which was not discharged from the steamship "Thor"?

A. Only a small part of it, as I remember it, was discharged from the "Thor," only 195 tons, 1410 pounds was discharged from the "Thor."

Q. Now, you may proceed.

A. On Tuesday, January 31, there was discharged from the "Thor," totals, 958 tons, 970 pounds to the wharf bunkers; 1556 tons, 560 pounds to the yard bunkers; 369 tons, 920 pounds to the offshore bunkers; 195 tons, 1410 pounds to the barge "Ruth"; 290 tons, 670 pounds to the barge "Nanaimo."

Q. That made a total discharge, according to these records, as indicated on the record itself, of what?

A. 3370 tons, 50 lbs.

Q. Now, will you take the next sheet and proceed with your explanation?

A. On Wednesday, February 1st, the vessel discharged, a total discharge of 1279 tons, 2170 lbs. to the wharf bunkers, 2137 tons, 290 lbs. to the yard bunkers; 520 tons, 1510 lbs. to the offshore bunkers;

(Testimony of W. H. Tidwell.)

195 tons, 1410 lbs. to the barge "Ruth"; 412 tons, 2090 lbs. to the barge "Nanaimo"; 74 tons, 1300 lbs. to the barge "Ruth," second load—

The COURT.—Mr. Tidwell, when you speak of the discharge on a certain day don't you think it would be more accurate if you would say it this way: At the close of that day there had [373—318] been discharged so and so much?

Mr. ROCHE.—Yes, your Honor, I think that would be better; I was just going to direct the witness' attention to that.

Q. Just before you conclude that date, and so that the jurors will understand exactly what these figures mean, these figures, to which you have just been directing the attention of the jurors, are totals indicating the total cargo discharged up to the evening of that date; is that correct? A. Yes, sir.

Q. Then at quitting time on the afternoon of Wednesday, February 1st, out of the cargo of coal imported into this port on the steamship "Thor," there had been discharged into the wharf bunkers, 1279 tons, 2170 lbs.; into the yard bunkers, 2137 tons, 290 lbs.; into the offshore bunkers, 520 tons, 1510 lbs.; into the barge "Ruth" 195 tons, 1410 lbs.; into the barge "Nanaimo" 412 tons, 2090 lbs.; and in addition to the 195 tons, 1410 lbs. there had likewise been discharged into the barge "Ruth" 74 tons, 1300 lbs.; that is correct, is it not? A. Yes, sir.

Q. From the system pursued by the defendant Mills, in keeping his books, and I am asking you this because it occurs to me that this is an explanation of

(Testimony of W. H. Tidwell.)

those two figures, are you able to state whether the 74 tons, 1300 lbs., indicated in these figures as having been laden on the barge "Ruth" separate from the 195 tons, 1410 lbs. because of the fact that the 74 tons, 1300 lbs. had been placed in the barge after the cleanup?

* * * * *

The WITNESS.—It shows here, on January 30th, that all had been checked out, and that there was no coal left in here.

Q. In other words, the cleanup of the barge occurred on January [374—319] 30th, 1911; is that correct? A. Yes, sir.

Q. When the overage of 66 tons, 1276 lbs. was ascertained? A. Yes, sir.

Q. This record shows, does it not, that the 195 tons, 1410 lbs., which had been laden upon the barge "Ruth," discharged from the steamship "Thor," was included in these figures as the result of which the overage was determined? A. That is true.

Q. And, so, of course, that quantity of coal had to be upon the barge at the time of the cleanup?

A. Yes, sir; after the cleanup from some vessel there was 74 tons, 1300 lbs. laden on the barge "Ruth," which appears on the record as a second load. On February 2d there had been discharged into the wharf bunkers 1341 tons, 1920 lbs.; the yard 2199 tons, 1800 lbs.; offshore bunkers, 520 tons, 1510 lbs.; the barge "Ruth," 195 tons, 1410 lbs.; that was the first load, the first "L," as it is shown here; 349 tons into the barge "Ruth," the second "L," as it is shown here.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—Q. Is that taken from the book, the first "L" and the second "L"?

A. Yes, sir.

Mr. ROCHE.—Q. That is supposed to represent the book itself, is it not?

A. Yes, sir. 412 tons, 2190 lbs. into the barge "Nanaimo," and 693 tons, 1170 lbs. into the barge "Theobold," making a total amount as having been discharged up to and including this date, 5713 tons, 940 lbs. On Friday, the 3d of February, there had been discharged into the wharf bunkers 1341 tons, 1920 lbs.; yard bunkers, 2601 tons, 110 lbs.; offshore bunkers, 641 tons, 30 lbs.; the barge "Ruth," first load, 195 tons, 1410 lbs.; the barge "Ruth," second load, 349 tons; the barge "Nanaimo," 412 tons, 2090 lbs.; the barge "Theobold," 946 tons, 1140 lbs.; the barge "Comanche," 702 tons, 1160 lbs.; [375—320] making a total discharge up to and including this date of 7190 tons, 1140 lbs., the vessel being short 52 tons, 1100 lbs. of its invoice weight.

Q. The word "short" and the figures "52 tons, 1100 lbs."; I am supplying the tons and lbs. because it will be conceded that that is correct, appear in the books kept by the defendant Mills; is that correct, Mr. Tidwell? A. Yes, sir.

Q. In other words, that is an exact reproduction of the figures and entries? A. Yes, sir.

Q. And that represents, does it not, the complete discharge of that cargo? A. Yes, sir.

Q. The entries continue, do they not, showing the disposition of the cargo, the final disposition?

(Testimony of W. H. Tidwell.)

A. The disposition of the cargo, yes, sir.

Q. Now, of course, if you will pardon me just a moment, there are entries upon the other side of the sheet in the books kept by the defendant Mills, but which relate to the cargo of a different ship; is that true?

A. Yes, sir. On Saturday, the 4th of February, the barge "Nanaimo" had received 14 tons, 460 lbs. from the offshore bunkers; 369 tons, 920 lbs. from the offshore bunkers; from the steamer "Thor," 412 tons, 2090 lbs., making a total received of 796 tons, 1230 lbs. On this date she discharged into the steamship "Siberia" 237 tons, 360 lbs., representing a balance of 559 tons, 870 lbs. On Monday, February 6th, 1911, the record still shows this amount which she had received on the previous dates from the offshore bunkers, 14 tons, 460 lbs.; offshore bunkers, 369 tons, 920 lbs.; the steamship "Thor" 412 tons, 2090 lbs., showing the total on board of 796 tons, 1230 lbs.; and that there had been discharged into the "Siberia" up to and including this date 505 [376—321] tons, 1340 lbs., leaving a balance in the barge of 290 tons, 1230 lbs.

Q. Now, let me just ask you this question; Under date of Monday, February 6, 1911, appears an entry, "Steamer Siberia, 505 tons, 1340 lbs." That represents, does it not, not only the amount of coal taken from the barge and discharged into the steamer "Siberia" on February 6th, 1911, but in addition thereto the 237 tons, 360 lbs. discharged into the steamship "Siberia" on the preceding Saturday?

(Testimony of W. H. Tidwell.)

A. That is true.

Q. In other words, these totals being carried forward the same as you have already testified; is that correct? A. Yes, sir; day by day.

Q. The disposition of this cargo which was discharged from the steamer "Thor" is now being proceeded with according to these books, is it?

A. It still shows the amount which had been received on the previous dates into the barge "Nanaimo," aggregating 796 tons, 1230 lbs., and up to and including this date there had been discharged into the steamship "Siberia" 663 tons, 850 lbs., leaving a balance in the barge of 133 tons, 380 lbs. On Wednesday, the 8th, the same amounts appear as having been received, making a total of 796 tons, 1230 lbs. The discharge into the "Siberia" appears to have been continued and on this date there had been discharged 775 tons, 1656 lbs., leaving a balance of 20 tons, 1804 lbs., on the "Nanaimo."

Q. In other words, she took on no more coal on the 8th but she discharged some portion of the cargo then remaining upon her into the steamship "Siberia"?

A. Yes, sir. Thursday, February 9, 1911, the barge "Comanche" appears to have received 112 tons, 74 lbs., from the offshore bunkers; from the steamship "Thor" 702 tons, 1160 lbs., or a total of [377—322] 814 tons, 1234 lbs.; and on the same date discharged into the "Siberia" 559 tons, 1360 lbs., leaving a balance on board the barge of 254 tons, 2114 lbs. On Thursday, February 9th, 1911—this is a different vessel.

(Testimony of W. H. Tidwell.)

Q. Oh, you have produced the entire entries, have you, although some of them relate to a different vessel. On Thursday, February 9th, 1911, the barge "Theobold" appears to have received 107 tons, 340 lbs. from the offshore bunkers; 946 tons, 1140 lbs. from the steamship "Thor," making a total received of 1053 tons, 1480 lbs.; on this date she discharged into the "Siberia" 474 tons, 183 lbs., leaving a balance on the barge of 579 tons, 1297 lbs. Friday, the 10th, the barge "Comanche" appears to have received 112 tons, 74 lbs. from the offshore bunkers; from the steamer "Thor" 702 tons, 1160 lbs., making a total received of 814 tons, 1234 lbs.

Q. Let me ask you right here, Mr. Tidwell: the 814 tons, 1234 lbs. represents a total quantity of coal laden upon that barge after the previous cleanup; is that correct? A. Yes, sir.

Q. All right, Mr. Tidwell, proceed.

A. She discharged into the steamer "Siberia" 845 tons, 2108 lbs., or 31 tons, 874 lbs. more than had been laden on the barge.

Q. The word "over" and the figures "31 tons, 874 lbs." are reproduced from the book? A. Yes, sir.

Q. And the "E" in red ink is also from the book?

A. Yes, sir, and also the number "1765" which refers to the number of a slip or a tag on which this discharge of coal was reported to the office.

Q. That is the tag to which you referred, or tags similar in [378—323] kind to the tags I hold in my hand, and which have heretofore been marked "U. S. Exhibit 127"? A. Yes.

(Testimony of W. H. Tidwell.)

Q. And "over 31 tons, 874 lbs.," represents the excess coal in weight taken off the barge more than was checked into her?

A. Yes, sir. Friday, the 10th, the barge "Theobold" appears to have received from the offshore bunkers 107 tons and 340 lbs.; from the steamship "Thor" 946 tons, 1140 lbs., or a total of 1053 tons, 1480 lbs.; and discharged into the steamship "Siberia" 615 tons, 618 lbs., leaving a balance in the barge of 438 tons, 862 lbs.

Mr. ROCHE.—Q. You are still continuing with the discharge of this steamship "Thor"?

A. This all refers to coal which was imported on the "Thor."

Q. Go ahead.

A. The barge "Ruth" appears to have received from the offshore bunkers 53 tons, 340 lbs. and the "Thor" 349 tons; offshore bunkers 52 tons, 340 lbs. From the "Puritan" 444 tons, 30 lbs., a total received by the barge of 898 tons, 710 lbs. She discharged into the steamer "Maitai," I believe it is, 300 tons; the "City of Sydney," 112 tons, 1854 lbs. a total discharge for this day of 412 tons, 1854 lbs., leaving a balance in the barge of 485 tons, 1096 lbs. Saturday, the 11th, the "Theobold" appears as receiving from the offshore bunkers—this amount was stated, which was received, on the previous sheet.

* * * * *

Q. In other words, those figures simply are a reproduction of the figures shown upon the previous page? A. On the previous sheet.

(Testimony of W. H. Tidwell.)

Q. And they are carried forward from time to time in this diary?

A. Yes. In this sheet the "Puritan" appears to have received [379—324] a total of 1053 tons, from the offshore bunkers—1053 tons 1480 lbs., from the offshore bunkers, and the steamer "Thor," and discharged into the steamer "Siberia" 902 tons, 38 lbs., leaving a balance of 151 tons, 1442 lbs. in the barge. Saturday the 11th. The "Ruth" again. It has previously been shown that the "Ruth" had received these amounts which are shown here, making a total of 898 tons, 710 lbs., and that she has discharged 300 tons into the "Maitai," 265 tons, 522 lbs. into the "City of Sydney," making a total discharge of 565 tons, 522 lbs., leaving a balance of 333 tons in the barge. On Saturday the 11th, the same day, the barge "Nanaimo" appears to have received—this I think has also been gone into.

Q. These have all been repeated?

A. Yes; it appears to have received up to and including this date 1414 tons, 430 lbs. and discharged into the steamer "Siberia" 775 tons, 1656 lbs., and the steamer "Pennsylvania" 75 tons, 100 lbs., making a total discharge of 850 tons, 1756 lbs., leaving a balance of 563 tons, 914 lbs. in the barge. The barge "Theobold," which has heretofore been shown to have received up to and including this date, 1053 tons, 1480 lbs., discharged into the steamer "Siberia" 1067 tons, 693 lbs., or 13 tons, 1453 lbs. more than was laden on the barge. Then appears "E," which I am unable to explain.

(Testimony of W. H. Tidwell.)

Q. The overage of 13 tons, 1453 lbs., represents of course the excess of coal weighed out of her beyond the amount of coal received in since the last cleanup?

A. Yes. This number also shows the date which it was reported on, Monday, February 14, 1911, barge "Nanaimo."

Q. Those figures have already been shown?

A. Yes. She had received a total of 1414 tons, 430 lbs. altogether; she discharged into the "Siberia" 775 tons, 1656 lbs.; into the "Pennsylvania" 424 tons, 1744 lbs., making a total discharge of 1200 tons, 1160 lbs., up to and including this date, leaving [380—325] a balance in the barge of 213 tons, 1510 lbs.

Q. What is the "Puritan"—the "Puritan" is a steamer, is she not? A. I don't know what she is.

Mr. McCUTCHEON.—I understood you were tracing the coal from the steamer "Thor."

The WITNESS.—We are.

Q. Haven't you got something from the "Puritan" there in the last sheet?

A. Yes, but the "Thor" appears here.

Mr. ROCHE.—You see there is still some part of the coal discharged from the "Thor."

A. That is the offshore bunker.

Mr. McCUTCHEON.—I understood you to say this operation was to trace the coal that had been landed from the "Thor"?

Mr. ROCHE.—That is correct; we are following this along until you finally complete the cargo of that steamer "Thor," but towards the latter end, of course, there is coal placed upon these barges from

(Testimony of W. H. Tidwell.)

some other source, but they are all foreign imported coal.

A. (Continuing.) The barge "Ruth" again on Wednesday, the 15th, as has been previously stated, she had received a total of 898 tons, 710 lbs. altogether; she had discharged into the "Maitai" 300 tons, into the "City of Sidney" 265 tons, 522 lbs. The "China" appears but not the tonnage. On February 16, 1911, the barge "Ruth" again appears, showing that she had received a total of 898 tons, 710 lbs., and discharged into the "Maitai" 300 tons, the "City of Sidney" 265 tons, 522 lbs., and the "China" 286 tons, 1202 lbs., or a total of 851 tons, 1724 lbs., leaving a balance of 46 tons, 1226 lbs. in the barge.

Q. Let me ask you this question by way of explanation in view [381—326] of the suggestion made by Mr. McCutchen a short while ago. As you have already testified, and as these records show, of course a part of the cargo discharged from the steamer "Thor" went into the yards, did it not? A. Yes.

Q. A part of the cargo discharged from the steamer "Thor" went into what is known as the in-shore bunkers? A. Yes.

Q. Now, can you state whether all of the coal which came out of the steamer "Thor," which did not go into the yard and which did not go into the offshore bunkers, is accounted for in these tabulations?

A. Yes, the entire discharge of the "Thor" is accounted for in this tabulation.

Q. Proceed.

A. Friday, the 17th, the barge "Ruth" again ap-

(Testimony of W. H. Tidwell.)

pears, showing that she has received a total of 898 tons, 710 lbs.; that there had been discharged from the barge "Ruth" up to and including this date 967 tons, 1906 lbs., showing an overage on the barge, discharged from the barge, of 69 tons, 1196 lbs., representing more actually than the records show was laden on the barge.

Q. Between the date of the preceding cleanup and this date?

A. Yes. Monday, March 6th, 1911, barge "Nanaimo"; she had received more coal, she appears to have received—I will change that entirely. She appears to have received from the offshore bunkers, 14 tons, 1460 lbs.; offshore bunkers 369 tons, 920 lbs.; steamer "Thor" 412 tons, 2090 lbs.; offshore bunkers, 56 tons, 1900 lbs.; "Puritan," 560 tons, 1780 lbs.; offshore bunkers, 518 tons, 30 lbs., or a total amount laden on the barge of 1932 tons, 460 lbs., which was discharged into the "Siberia," the "Pennsylvania," and the "Asia,"—a total of which was discharged into the "Siberia," "Pennsylvania" and [382—327] "Asia" of 1519 tons, 972 lbs., leaving a balance on the barge of 412 tons, 1728 lbs.

Q. That is the last sheet showing the discharge of the "Thor"?

A. Barge "Nanaimo," on Tuesday, the 7th, showed a total received of 1932 tons, 460 lbs.; a total discharge of 1704 tons, 284 lbs., with a balance of 228 tons, 176 lbs. On the 8th, Wednesday, there is shown a total amount received of 1932 tons 460 lbs.

* * * * *

A. No further coal seems to have been laden on

(Testimony of W. H. Tidwell.)

her. It still shows a total received of 1932 tons, 460 lbs., with a total discharge of 1989 tons, 356 lbs., or over 56 tons, 2136 lbs.

Q. In other words, 56 tons, 2136 lbs. was taken off of that barge in excess of the amount checked in or laden upon her; is that correct? A. Yes.

Q. Between that date and the date of the previous clearance? A. Yes.

The diary or dock books kept by the defendant Mills from January 1, 1904, to the end of December, 1912, disclose, to the best of my knowledge, the receipt and disposition of every cargo of foreign coal in the same manner as the entries that have already been called to the attention of the jury and to which I have testified. The bookkeeping is the same as the samples which I have gone over.

[**Testimony of William Chisholm, for the Government.]**

WILLIAM CHISHOLM, a witness called for the United States and sworn, testified as follows:
[383—328]

Direct Examination by Mr. ROCHE.

I live in San Francisco. I am now and have been for six years and eleven months last past marine superintendent of the Pacific Mail Steamship Company. My office is at pier 42. Before I became marine superintendent I was chief engineer of the steamship "Mongolia" of the Pacific Mail Steamship Company, plying between San Francisco and Oriental ports. I am and have been for some time past

(Testimony of William Chisholm.)

familiar with various employees connected with the company, and particularly with those employed on the boats plying between San Francisco and other ports. In 1906 there was a Captain Anderson, who was captain of the old mail dock. He is now dead. I believe he had been in the employ of the company for fourteen years. He died four or five years ago. There was a man known as "Chief Allen," who used to be chief engineer on the "Asia" (which was formerly called the "Doric"). This was one of the boats of the Pacific Mail Steamship Company. I know of a McCarthy in the employ of the Pacific Mail Steamship Company, but I do not know his initials. I have known him for the last ten years, and I believe he has been connected with the company for thirty years. In the year 1906 there was a man named Captain Wilson who was chief or boss stevedore, and who remained in the employ of the company until about two years ago. At that time he was employed jointly by the Pacific Mail and the O. & O. Steamship Company. I think he had supervision of the coal on the ships of the Occidental & Oriental Steamship Company. His initials were "T. D. E." I have a slight acquaintance with a man named B. A. Hartnett or Har nett, who was connected with the Toyo Kisen Kaisha Company. I heard he is at present employed by that company in the Orient. When he was employed by the Japanese Company in San Francisco, his title around the water front was assistant to Mr. Avery, who was assistant to the [384—329] manager of that company. I have an acquaintance with a man named J. Crichton, who, I think, is port stevedore for

(Testimony of William Chisholm.)

the Japanese Steamship Company, and has been for a number of years. I do not know whether he has anything to do with the supervising of the loading of coal upon the boats of that company.

The Pacific Mail Steamship Company for a number of years has been purchasing its coal from the Western Fuel Company.

There once was a Mr. Hauxhurst connected with the Pacific Mail Steamship Company as marine superintendent. The McCarthy of whom I have spoken, is a clerk in the treasurer's office.

(Subject to correction, admitted by counsel for the defendants that the McCarthy, whose name appears in the donation account of the Western Fuel Company, is the McCarthy about whom the witness has just testified.)

My duties as marine superintendent for the Pacific Mail Steamship Company comprise the physical upkeep of their steamers, and I have charge of their docks in general. I have supervision of the coaling of the boats. I certify to the weights of the coal, upon which payments are made by the Pacific Mail Steamship Company to the Western Fuel Company.

I have since I have been marine superintendent received donations from the Western Fuel Company. To the best of my memory the first donation was about the first Christmas that I was marine superintendent. That was in 1908. I received a Christmas present. It was about \$50, and I was receiving that sum each year thereafter. It was in cash. I have also during the entire time that I have been active as marine superintendent been receiving donations of

(Testimony of William Chisholm.)

coal from that company. [385—330] The first donation of this kind, I think, was in 1908. I have been receiving my coal from the Western Fuel Company ever since. It has been delivered at my home in, I think, ton or two ton lots. I would receive two or three such lots each year, I suppose, but I did not keep accurate track or record of it. At any rate, whatever coal I use at my home has been received from the Western Fuel Company, and has been received by me practically ever since I have been marine superintendent. I do not recall ever receiving a bill for such coal. I do not remember ever paying any compensation to the Western Fuel Company for any coal delivered to me. I have no memory of any occasion where the Western Fuel Company turned over \$125 or \$150 to me, nor do I recall distributing any such sum to any of the other employees of the Pacific Mail Steamship Company.

The name of the principal checker or weigher of the Pacific Mail Steamship Company is William Park. He has been chief weigher for, I think, about thirty-one years. His duties consist, among other things, of immediately supervising the discharge and weighing of coal laden into the boats of the Pacific Mail Steamship Company for fuel purposes, and making up the tally sheets and accounts upon which the bills of the Western Fuel Company are finally paid.

Cross-examination by Mr. McCUTCHEN.

Those tally sheets are prepared from weights which are secured from the custom-house or Government

(Testimony of William Chisholm.)

weigher. I have been present from time to time when coal was being delivered by the Western Fuel Company to the Pacific Mail Steamship Company's liners. Mr. Park usually represents the steamship [386—331] company on such occasions, if we are working one barge only; but if we are working more, we have had outside weighers. Mr. Park's duty on such occasions is to check up the tubs with the custom-house weigher. He remains on the barge during the entire operation. He reports to the steamship company the amount of coal that goes each day from the barge into the liner. He gets his weights from the scales and the custom-house officer. The custom-house officer is in charge of the scales and actually manipulates them. Mr. Park has nothing to do with that. The weights which he takes are determined by the custom-house officer. On the barges I know from personal observation that one tub in every 15 is weighed. The custom-house officer designates which tub shall be weighed. While the tubs are being loaded or filled, the officer remains there on the barge, or on the dock close by, where he can witness the operation. When you are first starting on two of the barges you shovel for about an hour and a half or two hours until you get the coal away from the scales and then you take an average. You would then average up a dozen or so buckets right after you get the coal cleaned. When a bill is rendered by the Western Fuel Company to the Pacific Mail Steamship Company for coal supplied by the former to the latter, that bill is checked up with the report to us of Mr. Park. It is part of my duty to see and to

(Testimony of William Chisholm.)

know that the weights for which the Pacific Mail Steamship Company pays the Western Fuel Company are correct. All of the checking up of the weights of the deliveries of coal to the Pacific Mail Steamship Company's liners has been done by Mr. Park until the last year and a half, and during said last year and a half, I should judge, he has done about 90 or 95 per cent of it. Mr. Park takes his station on the barge when the coaling operations are in progress. I have been on the barges, as I have heretofore said, frequently when said operations were going on. Mr. Park was so stationed on those occasions as to be able to see [387—332] the entire operation.

I met once a Captain Lewis, who was in the employ of Hind, Rolph & Company. He was in their employ about two years ago, and was then, I believe, their port captain.

Redirect Examination by Mr. ROCHE.

I have several times stood by and seen coal weighed in the barges,—I should judge half a dozen times in the past several years. I never endeavored to find out what was the weight of coal that was being laden upon a barge, before said coal was discharged from the barge into our liners. Indirectly, I have been notified, as marine superintendent, that the coal was being overweighed. Such indirect notifications came to me while I was receiving donations of coal and money. I think I had such indirect information in 1912. In 1909 I received notice about the first shortage of coal on one of our ships. I never made any

(Testimony of William Chisholm.)

investigation for the purpose of ascertaining the weight of the coal that was checked in or upon the barges, or whether coal had been weighed before it was placed on the barges.

I knew a man by the name of Sawden, who was at one time chief engineer on one of the boats of the Pacific Mail Steamship Company, but I do not recall receiving notice from him of a shortage. I would say that I did not receive such notice. I do remember receiving such a notice from a man named Hamilton, who was chief engineer on one of our boats. I should judge that was in 1911 or 1912. I also received notice from a man named Bunker, who was chief engineer on one of our boats. I do not remember receiving notice from Chief Engineer Sullivan. After receiving these notices I did not endeavor to ascertain whether the coal discharged [388—333] from the barges was weighed before being so discharged. I remember a man named Blake being once in the employ of the Pacific Mail Steamship Company. He is stenographer in my office. Boats are not very often coaled at night. Sometimes boats are coaled from both sides at the same time and from different barges, one on either side; and, of course, when that occurs, it is impossible for one man to watch operations upon both sides of the ship.

Recross-examination by Mr. McCUTCHEON.

After receiving the reports that the Pacific Mail Steamship Company was not receiving full weight on the deliveries of coal to its liners I made certain investigations. I could not find any proof that we

(Testimony of William Chisholm.)

were short, and, of course, it was my duty to know whether we were short or not. I watched the operations of the barges very closely, and I also looked over the performance of our ships to see whether they were running short of coal in any way. I would examine, for instance, the log sheet of the ship, which shows the consumption of coal on each voyage, and also shows the quantity of coal delivered to the ships and the quantity that was in the ship's bunkers before the voyage began. My experience was such as to enable me to tell about what the consumption of coal on a given voyage would be. Using all of that information, and making the investigation which I have said I did make, I reached the conclusion that the Pacific Mail Steamship Company was not paying for any more coal than it was actually receiving. The complaint that came from Engineer Hamilton, to which I have heretofore referred, was in writing.

(Admitted by counsel for the prosecution that the copy of a letter produced by counsel for the defendants is a copy [389—334] of the letter which was written by Engineer Hamilton to the witness, and which is last hereinabove referred to.)

The letter which I received from Engineer Hamilton was a communication, not a complaint. The letter which you now show to me was the communication. I think I received another complaint from Hamilton other than the one you show me.

(The communication here referred to was here read in evidence, and is and was in the words and figures following:)

(Testimony of William Chisholm.)

“S. S. ‘Siberia.’

“Honolulu, January 31st, 1910.

“Wm. Chisholm, Esq.,

“Marine Superintendent, P. M. S. S. Co.

“Dear Sir:

“I cannot give you a correct report as to the quality of the Australian coal from here, as the bunkers we had to use from the Australian and Wellington coal were mixed, but as a whole the coal is much better than last voyage.

“We will have about 1200 tons of the Australian coal on hand leaving here that I can use separately so I can send you a correct report as to its quality from Yokohama.

“Our average daily consumption was 160 tons, but I have to log 7 tons per day more to bring the bunkers square, as from the amount we were charged with fully 100 tons of rain water went in with the coal.

“Everything worked splendidly all the way down; hadn’t any trouble whatever, and at [390—335] present everything in the department is in good order.

“Yours respectfully,

“(Signed) J. S. HAMILTON,

“Chief Engineer.”

I cannot say exactly from memory, without looking at the records, how much coal Hamilton’s steamer had on her when she left San Francisco. It would be, I should think, about 2,000 tons. The vessels were taking all the way from 1,500 to 3,300 tons. If there had been a system of short-weighing con-

(Testimony of William Chisholm.)

stantly and persistently pursued on the deliveries of coal to the Pacific Mail Steamship Company, such short-weighing would certainly have shown in the logs of the steamers, and especially on the smaller ships where it would have been detected very readily. To the best of my knowledge I received only two complaints about short weighing since 1907. The complaints were not general in their character. They referred to particular steamers on particular trips. The steamers were the "Manchuria" and the "Siberia."

Once or twice when coal was being laden into our liners at night I was present for the purpose of seeing how the coal was handled and whether our men were at their stations. Those visits of mine occurred, I think, in 1911, and they were with reference to the complaints or communications hereinbefore referred to. I went there quietly, not making my presence known, because I wanted to see whether there was anything wrong in the operation of coaling. On each occasion, I remained an hour or half an hour. I discovered nothing wrong on either occasion. In the years 1911 and 1912 I had the scales on the barges tested perhaps a dozen times off and on. The tests were made on or about the time that I received the complaint from Engineer Hamilton. [391—336] I know also that those scales were tested from time to time by the Government. We paid for coal on the Government weights on all occasions.

Further Redirect Examination by Mr. ROCHE.

There is no question that even though the scales

(Testimony of William Chisholm.)

had been tested, the coal would still not be properly weighed unless the buckets which had been weighed fairly represented the average buckets of coal discharged into the steamship. I said on recross-examination that I went down to the steamers at night in connection with the complaints that I had received. The occasions when I went down there were in 1911. It is true that the first complaint I received was around 1908 or 1909. The reason I waited two years before going down to the dock at night to find out whether the coal had been properly handled was that I was satisfied when I received the first complaint that there was absolutely nothing in it.

Mr. ROCHE.—Q. You did testify, did you not, Mr. Chisholm, that the only complaints you received regarding the short-weighing of coal, or short-weighting, were two complaints? A. Directly.

Q. Yes, directly; we will come to the indirect complaints in a few moments. And you remember, do you not, in response to a question put to you by Mr. McCutchen, testifying that the reason why you went down to the dock in 1911 was because of the complaints and the communications; do you remember that? A. Yes, sir.

Q. And did you not Mr. McCutchen in the same question use the word "communications"?

A. Yes, sir.

Q. Did you receive any more than two communications to your [392—337] knowledge regarding these complaints of shortages? A. No, sir.

Q. Then when Mr. McCutchen put that question to

(Testimony of William Chisholm.)

you, you understood, did you not, that the number of communications to which he was referring was two; is not that correct? Is not that correct, Mr. Chisholm?

A. Well, I could not say that that is correct. What I figured on was Hamilton's complaint.

Q. Did you not, in response to a question put to you by Mr. McCutchen, in which he referred to the words "complaints" and "communications" understand him to mean, or to refer to rather, the two complaints and two communications?

A. I referred to them as the one complaint on the "Siberia."

Q. One complaint from the "Siberia"; why did you not so state in your answer to the question propounded to you by Mr. McCutchen?

Mr. STANLEY MOORE.—That is objected to as argumentative. The testimony speaks for itself.

Mr. ROCHE.—I won't press the question because I agree with counsel that his testimony does speak for itself.

Mr. STANLEY MOORE.—Yes, it does. His testimony is certainly very plain.

Mr. ROCHE.—Q. Now, getting back to the logs kept by Chief Engineers, and to which you have referred, the Chief Engineer upon these boats takes the weights as they are furnished to him by the Pacific Mail Steamship Company as to the quantity of coal laden into the bunkers? A. Yes, sir.

Q. In other words, take the "Manchuria," for instance, when the "Manchuria" is loaded with coal

(Testimony of William Chisholm.)

at this port the quantity of coal which is supposed to be laden upon her or discharged into her bunkers is turned over to the engineer; is not that correct? [393—338]

A. At this port, and we take the engineer's word as to what is in the ship.

Q. You take the engineer's word as to what is in the ship, and then you give to the engineer the quantity of coal your assume has been laden into the bunkers? A. Yes, on a certificate.

Q. On a certificate furnished by whom?

A. By the Pacific Mail.

Q. In other words, so far as the engineer is concerned, the only knowledge he has as to the quantity of coal discharged into the boat at this port would be the weight given him by the Pacific Mail Steamship Company; is not that true? A. Yes, sir.

Q. In other words, the engineer does not go into the bunkers after the boat has completed coaling for the purpose of measuring the coal to determine how much coal he has in the bunkers; that is also true, is it not?

A. Well, that is up to the engineer. I cannot—

Q. (Intg.) Is it not a fact—

Mr. McCUTCHEON.—You don't let him answer, Mr. Roche. You are awfully rapid this morning.

Mr. ROCHE.—Q. You say that is up to the engineer? A. Yes, sir.

Q. Don't you know, as an expert,—and counsel has cross-examined you as an expert,—that it would be impossible for an engineer to go into the bunkers

(Testimony of William Chisholm.)

after the boat has coaled for the purpose of measuring the coal? A. No, sir.

Q. Did you ever know of a chief engineer to do that? A. Yes, sir.

Q. Is it ordinarily done by him? [394—339]

A. It all depends what ship it is and the kind of bunkers you have.

Q. And it depends to a great extent also on the shape and the location of the bunkers, too, whether the bunkers are accessible, does it not?

A. Yes, sir.

Q. And it is also true that on a number of these big boats the engineer cannot get into the lower bunker until the coal is taken out of the upper bunkers; is not that true? A. Yes, sir.

Q. So that it is true, especially with reference to the big boats controlled by the Pacific Mail Steamship Company, that the chief engineer relies exclusively on the weights given to him by the Pacific Mail Steamship Company?

A. On the small ships, yes, but not upon the large ones.

Q. Why not?

A. Because you can get into your bunkers on the large ships the next morning or on the afternoon that you stop coaling. You take the coal from the bottom. The condition of the bunkers is entirely different on the large ships from what it is on the small ships. If the coal on the "Mongolia"—the ship I was familiar with—if they finished coaling to-day, this morning I could go in those top bunkers

(Testimony of William Chisholm.)

and measure up if there was any shortage.

Q. Could you go into the bottom bunkers?

A. There are no bottom bunkers in the after end of the ship. There is only one bunker, that is a bottom bunker. The rest of them are on the up-deck. There are no bunkers in the hold of the ship of any size, except the forward main bunkers.

Q. Don't you know as a matter of fact, Mr. Chisholm, that the chief engineer, so far as this port is concerned, upon all of the boats of the Pacific Mail Steamship Company relies upon the [395—340] weights furnished to him by the company for the purpose of determining the quantity of coal which he has in the bunkers at the time the boat leaves this port?

A. If he is on to his job he ought to satisfy himself. I have always went into the bunker after coaling the ship.

Q. You say if he on to his job; don't you know that that has been the practice of engineers in the employ of the Pacific Mail Steamship Company to rely on the weights given to them by the Pacific Mail Steamship Company relating to the quantity of coal laden into the ship at this port?

A. On some ships possibly.

Q. Don't you know that so far as the daily consumption of coal is concerned that the log contains an average and is based upon an average?

A. Yes, sir.

Q. You know, do you not, Mr. Chisholm, that when the boat reaches we will say the port on the

(Testimony of William Chisholm.)

other side, that then for the first time the engineer goes into the bunkers and estimates the quantity of coal he has on hand?

Mr. McCUTCHEON.—Do you mean the first time after leaving this port?

Mr. ROCHE.—Yes.

A. No. He ought to go in every day, or twice a day.

Q. You say he ought to go in? A. Yes, sir.

Q. Is it not a fact that the log is made up in this way: That the engineer figures out the coal he has in the bunkers at his home port; that he then figures out the quantity of coal he has in the bunkers at the other port, and after making the subtraction between the two he figures out the time consumed in the journey and fixes the daily consumption of coal?

A. He would be a very careless engineer, and he would be liable [396—341] to get caught almost any time if he figured that way.

Q. Don't you know that that is practically always done? A. No, sir, not on a big ship.

Q. And don't you know that they all do it?

A. No, sir. The engineer coming into this port, the termination of the voyage at Pt. Bonita, the voyage stops there, and from Pt. Bonita until he goes out to Pt. Bonita it is port consumption.

Q. And the daily average of port consumption is usually ascertained at either end of the voyage; is not that true? A. Yes, sir.

* * * * *

(Testimony of William Chisholm.)

Q. Now, getting back to this complaint or this communication as it was referred to by Mr. McCutchen, signed by J. S. Hamilton, on the 31st day of January, 1910, you, of course, read that language, did you not, which is contained in this letter in which it is said: "Our average daily consumption was 168 tons, but I have to log 7 tons per day more to bring the bunkers square as from the amount we were charged with fully 100 tons of rainwater went into the coal." Of course, as marine superintendent of the Pacific Mail Steamship Company you did not intend to permit your employers to pay for rain-water, did you?

A. I don't see how we could stop it.

Mr. ROCHE.—Q. Well, did you, after receiving this document which Mr. McCutchen designates as a communication and which I designate as a complaint, make any complaint to the Western Fuel Company seeking a return of that portion of the money paid to it representing the 100 tons of rain-water?

A. I respectfully referred that to our manager who handles those cases. [397—342]

* * * * *

Q. Directing your attention for a moment to these logs upon which you were examined on cross-examination—by the way, Mr. Chisholm, the "Siberia" is a big boat, is it not? A. Yes.

Q. And Mr. Hamilton was on the "Siberia," was he? A. He was, and is at present.

(Testimony of William Chisholm.)

Mr. McCUTCHEON.—Is that written from the “Siberia”?

Mr. ROCHE.—It is.

Q. I want to call your attention to these averages. “Our average daily consumption was 168 tons.” I will ask you if it is not a fact that the log kept by Mr. Hamilton on that particular trip of that particular steamer would show simply the average daily consumption of coal.

* * * * *

A. It should show closely.

Mr. ROCHE.—Q. Just calling your attention to a little more of the language contained in this letter, “but I have to log 7 tons per day more to bring the bunkers square”; now, it is a fact, is it not, that at least in this instance, which shows a report made by the chief engineer upon one of the big boats, he did so fix the log of that boat that it did represent simply a general average of the coal consumed per day, including 7 tons of coal which she did not consume at all; is not that correct? A. Yes, sir.

Q. So at least so far as this particular boat is concerned the general average referred to by me some time ago was pursued. A. Yes, sir.

Q. And the chief engineer in this particular instance did find out his shortage of coal at the end of the journey and did take the shortage into consideration in fixing the daily consumption [398—343] of coal in the log.

A. That was only a short portion of the voyage,—Honolulu; that is only one-sixth of the voyage.

(Testimony of William Chisholm.)

Q. At any event, he did do that so far as the log is concerned on the journey of that ship from San Francisco to Honolulu. A. Yes.

Mr. McCUTCHEON.—Mr. Roche, will you enlighten us by showing us how the engineer could have done that and not take a measurement of his bunkers?

Mr. ROCHE.—Q. And so there will not be any confusion about the matter, Mr. Chisholm, because of the suggestion just made by Mr. McCutchen, the engineer did take into consideration the weight of the coal given to him by the Pacific Mail Steamship Company at this port, and he measured the coal in his bunkers at Honolulu, and determined that there was a shortage, and averaged the daily consumption of coal, including the shortage, and placed that daily consumption in the log; is not that correct? A. Yes; that is the way it looks there.

Mr. ROCHE.—So far as I am concerned, may it please the Court, and I simply make this statement in response to the suggestion of counsel, I have never seen this letter before; and these books were brought here under subpoena and are located in the other room.

Q. I call your attention to a letter or a communication dated at Honolulu, January 29, 1909, and ask you if that is the communication which you received from Chief Engineer Bunker at that time?

A. Yes.

Q. And that is the postscript to which you referred, is it? A. Yes. [399—344]

(Testimony of William Chisholm.)

Mr. ROCHE.—We offer this letter in evidence:

“PACIFIC MAIL STEAMSHIP COMPANY.

“Voyage 18, at Honolulu.

“January 29, 1909.

“Subject: Shortage of Coal Received at

San Francisco, Voyage 18.

“W. Chisholm, Esq.,

“Marine Superintendent, P. M. S. S. Co.

“Dear Sir:

“Please be advised that in coaling at S. F. we received all coal taken on board in reserve bunker and drew from main bunkers for port use. Have weighed samples of the coal supplied in S. F. and find it runs 41 cubic feet per ton (when allowed to partly dry out); by allowing this average, we are still 123 tons short. This shortage I have charged to port consumption at S. F., making 309 tons in place of 186 tons as actually burned.

“Respectfully,

“W. L. BUNKER,

“Chief Engineer.

“P. S. Cannot report on quantity of coal as we have been using”—

(Addressing the witness.) Is that quantity or quality in the postscript? It refers to certain Japanese coal that you know more about than I do.

A. (Reading.) “P. S. Cannot report on quality of coal as we have been using Takasima and Tagawa on passage down.”

* * * * *

Q. By the way, upon cross-examination you testi-

(Testimony of William Chisholm.)

fied in response to some questions put to you by Mr. McCutchen that these complaints [400—345] that you received regarding a shortage of coal related to specific instances and particular steamers; is that correct? A. Yes.

Q. In each instance? A. Yes.

Q. Now, so that there won't be any more confusion between counsel and none between yourself and myself, is that statement accurate when you take into consideration what you have heretofore referred to as indirect notification of shortages?

A. No, sir.

Q. It is not? A. No.

Q. So that the indirect notices which you received from time to time related to a general overweighing of coal, isn't that correct, and not to specific instances?

* * * * *

A. I received, I think, on two occasions, one or two occasions, indirectly an insinuation that we were getting a short amount of coal on our ships.

Mr. ROCHE.—You say that you received directly—

A. (Intg.) Indirectly. It was an indirect insinuation, it was an insinuation that we were getting a short amount of coal.

Q. Isn't it a fact that you received a direct statement from David S. Powers, to the effect that the Pacific Mail Steamship Company was being overweighed upon coal? A. Not directly.

Q. What do you mean by "not directly"?

(Testimony of William Chisholm.)

A. When David Powers came out of jail he came to me to appeal for his father and himself to coal our steamers. He was down seeing me on one or two occasions; that is, I should judge, in 1912, after he got out of Alameda County Jail. I told Mr. Powers the last time, I says, "You put yourself on record." He told me that [401—346] he could, if him and his father could get the coaling back, that he would save the Pacific Mail Company a great deal of money, and he would get more coal in the bunkers than at the present time was getting in.

Q. When was that?

A. That was, I should judge, around, shortly before the indictment of Mr. Donaldson, around, I should judge, in August.

Q. August of what year? A. I think last year.

Q. Now, he did tell you—you don't mean the present year? A. No, 1912.

Q. So that you were told at that time, were you not, by him, that there had been overweighing of coal?

A. Not directly. When I put the question to him directly for his information, he said, "Well," he shrugged his shoulders and walked away.

Q. And that was some time in 1912; is that correct? A. 1912.

Q. From what other sources did you indirectly receive information that there was a general overweighing of coal?

A. That same year, I should judge it was, around about the spring, his brother, Eddie, came to me and

(Testimony of William Chisholm.)

wanted to get his father back in the coaling business, that is, trimming the coal, and he intimated, he did not come right out directly, and when I told him, I says, "What have you to show for this"? he says, "Well, if we get our coaling back, if we could get coaling our ships, or your ships, we could save you a whole lot of money, on the storage of coal."

Q. That was in the early part of 1912; is that correct?

A. No, I don't remember exactly when it was; it was shortly, I should judge, before Dave was down there. [402—347]

Q. Now, after having received those two communications to which you have referred, the written communications, and these indirect charges that the coal was being overweighed, did you at any time attempt to find out at what weight the coal was laden into the barges? A. No.

Recross-examination by Mr. McCUTCHEON.

During the time that I have been marine superintendent of the Pacific Mail Steamship Company the company has had in commission 17 or 20 liners. Four are large steamers, three intermediate size ships, and about fourteen small ones. Of that entire number about four large liners have bunkers so situated that the contents can be ascertained after the ship has coaled. Those four large ships have made on the average four and a half voyages a year during the time I have been marine superintendent. That would be in five years approximately 22 voyages for each of those four steamers, or 88 voyages in the

(Testimony of William Chisholm.)

aggregate. I have received in all those 88 voyages 2 complaints with reference to the deliveries of coal to the steamers by the Western Fuel Company. I have said that with the exception of the reserve bunker on the "Mongolia" and "Manchuria," those large steamers have their bunkers so placed that the chief engineer can measure the coal in the bunkers after the loading is complete. The capacity of the reserve bunker is known. It ought to be quite easy to tell after the coaling operation is completed whether or not the reserve bunker has been filled to its capacity. Therefore, knowing the capacity of the reserve bunker, and so being able to tell whether it has been loaded to its capacity, and it being possible to get at the other bunkers on those ships, there is no difficulty whatever in an engineer [403—348] being able to determine the amount of coal that he has on hand before his ship sails. If there had been a system of short-weighing pursued in the delivery of coal to the smaller steamers there would, during all the time I have been marine superintendent, have been no difficulty in discovering that fact.

Mr. McCUTCHEON.—Q. The letter from Chief Engineer Bunker, which has been called to your attention, says, among other things, "This shortage I have charged to port consumption at San Francisco, making 309 tons, in place of 186 tons as actually burned." Did you make any investigation after receiving that communication, for the purpose of determining how the port consumption which the chief engineer refers to in his letter, compared with

(Testimony of William Chisholm.)

his port consumption ordinarily? A. Yes.

Q. I don't know whether I understand it correctly, but I did get the understanding from this communication that he has charged 309 tons to port consumption. Is that the way you understand it? A. Yes.

Q. Will you take the communication? A. Yes.

Q. Did you make any investigation to determine about what his port consumption should have been for the time he was in port on that occasion?

A. Yes.

Q. What did you determine that he should properly have consumed in port during that time?

A. 225.

Q. 225 tons? A. Yes.

Q. Then you don't think he could have possibly got along with 186 tons during his stay in port on that occasion? A. No.

Q. Assuming that he had reported 225 tons as his port consumption during that stay, would not that consumption have been exceedingly [404—349] small for the time he was in port? A. The 225?

Q. Yes. A. No, it would be about right.

Q. It would be about right? A. Yes.

Q. Did you make any investigation, after receiving that complaint, to determine how Chief Engineer Bunker's consumption of coal on that voyage compared with his consumption of coal on other voyages? A. Yes.

Q. What was the result of that investigation?

* * * * *

(Testimony of William Chisholm.)

A. The voyage was lower than the previous voyage.

Mr. McCUTCHEON.—That is to say, according to the log of Captain Bunker on that voyage on which he complained of having been short-weighted, he made a better record than he had ever made before on any previous voyage. A. Yes.

Q. That is to say, his consumption of coal was less per mile than on any voyage he had previously made?

A. The gross amount of coal, the total amount of coal he received during that voyage, was less.

Q. The total amount of coal he received during that voyage was less. A. Yes.

Q. Did he get all of his coal for that voyage at San Francisco? A. No.

Q. Where else did he get coal?

A. Nagasaki, I think, and I don't know if he took any at Honolulu or not.

Q. At any rate, when he returned here, he reported to you the coal which he had received at foreign ports? A. Yes.

Q. And you took that into account in reaching the conclusion which you have announced here, that he had made a better record [405—350] on that voyage than he ever had made during any previous or subsequent voyages? A. Yes.

Q. Now, you have said that the capacities of these steamers which you have designated as "medium size" and "small" is ascertainable easily. Let me ask you whether you ever received any complaint during the five years that you were marine superin-

(Testimony of William Chisholm.)

tendent of the Pacific Mail Steamship Company from any captain of one of those medium-sized or small steamers, as to the quantity of coal delivered to the steamer? A. No.

Q. You never did? A. No.

Q. Did you ever receive any such complaint from the chief engineer of any one of those medium-sized or small boats? A. No.

Q. You say that from the letter of Chief Engineer Hamilton you take it that he had determined his daily average after he had reached the port of Honolulu. Don't you gather from that letter that he actually went into his bunkers and made a measurement to determine their contents at that time?

A. I should judge he would; I assume he would.

Mr. ROCHE.—I assume so at Honolulu.

Mr. McCUTCHEON.—Q. That is to say you said that was about one-sixth of the voyage, didn't you?

A. The voyage is about 15,000 miles, and that is 2100.

Q. That is 2100 miles? A. Yes.

Q. Ordinarily the ships do not coal at Honolulu, do they? A. They do now, yes.

Q. They do now. Has that been the practice during all of your superintendency?

A. Some of the ships, yes.

Q. They take on comparatively little there, don't they?

A. Well, they take from 300 to 500 or 600 tons.

Q. Out of a total capacity of how much, that is, I speak of those [406—351] large steamers?

(Testimony of William Chisholm.)

A. 3300, or about that; 3300 or 3200.

Q. You don't know whether on this particular voyage the "Siberia" took on any coal at Honolulu?

A. No, at least I think—it is stated there in the communication—didn't he state that he received some coal at Honolulu?

Q. I have forgotten that if he did.

A. I don't think they took very much coal there at that time.

Q. I don't understand that he says that, Mr. Chisholm. That letter may mean more to you than it does to me. (Handing.)

A. No. I could not say. That is misleading, because he says he had 1500. You would have to look at his records.

Q. At any rate, you can't tell from the letter, itself, whether he coaled at Honolulu?

A. No, it is misleading.

Q. Do you know how the chief engineers get at the daily consumption of coal?

A. Well, there are different ways.

Q. State whether or not, from your experience, both as a chief engineer and as marine superintendent, you know that the chief engineer makes an entry in his log daily of what he assumes to have been the consumption of coal for the previous day.

A. Yes.

Q. Now, that averaging which counsel has interrogated you about, if there is any averaging, is made at the end of the voyage, isn't it, as a rule?

A. Well, the average is made from here to Hono-

(Testimony of William Chisholm.)

lulu, and from Honolulu to Yokohama, and then you would have to average from Yokohama along the coast. It is very difficult to say how much you are consuming along the coast.

Q. What is that, because you are in port more or less? [407—352]

A. You are in port a great deal.

Q. But when you are actually under way, the chief enginer knows about what his consumption should be from day to day, does he not?

A. He should be very close to it; he might be off.

Q. He would not be off very much.

A. He should not be off over 15 tons.

Mr. ROCHE.—Q. A day?

A. It depends how much he is burning. If you burn 150 or 200 tons a day, it is quite easy to be out 10 tons or 15 tons.

Mr. McCUTCHEON.—Q. Ordinarily, and I suppose invariably, the Pacific liners coal here before they leave for the Orient, do they not? A. Yes.

Q. Now, having coaled here, what is their next coaling station in the ordinary course of events?

A. Honolulu.

Q. Where do they coal after coaling at Honolulu?

A. Yokohama.

Q. Where next? A. Nagasaki.

Q. And then? A. Back to Nagasaki.

Q. Back to Nagasaki? A. Yes.

Q. Where do they go from Nagasaki; you say back to Nagasaki?

A. From Nagasaki to Manila, and to Hong Kong,

(Testimony of William Chisholm.)

Shanghai, to Nagasaki, to Kobe, and then to the tea ports, Catmitsu.

- Q. She coals at San Francisco? A. Yes.
Q. And ordinarily at Honolulu? A. Yes.
Q. And at Yokohama? A. Yes.
Q. And at Nagasaki twice? A. Yes.
Q. On each voyage? A. Yes.
Q. Does she coal at Yokohama again?
A. Yes, some of them.
Q. Does she coal at Honolulu again? A. Yes.
Q. And then comes on to the port of San Francisco? A. Yes. [408—353]

Further Redirect Examination by Mr. ROCHE.

Q. Of course, it is true, is it not, Mr. Chisholm, that the amount of coal which a boat burns during a given journey depends to a great extent upon the character of the weather with which the boats have to contend?

- A. Yes, and the voyage out from drydock.
Q. And of course, these daily averages estimating the consumption of coal each day are frequently made by the engineers without going into the bunkers at all, that is, by other tests; that is correct?

A. Yes.
Q. By building, for instance, a box alongside of the fire-room, or alongside the fire-room, in which a certain quantity of coal is put and tests made from that?

- A. Yes, but it is not practical.
Q. What is that?
A. It is not practical, on account of the amount

(Testimony of William Chisholm.)

you use; that is all right on a small steamer, but in a big boat you use too much coal, you have not got the room.

I ordinarily receive the money contributions to which I have testified from the defendant Mills. That was always the case. He followed the same procedure last year after these indictments were found. The contributions are made in money invariably, not by check. No receipt is asked or given. I don't remember ever receiving any money and turning it over to any other employee of the Pacific Mail Steamship Company. When I wanted coal at my home I would order it from Mr. Mills. I don't remember any bill ever being sent. I might sometimes have ordered coal through Eddie Powers, at that time one of the employees of the Western Fuel Company. I don't remember [409—354] ever ordering coal from anybody else.

Further Recross-examination by Mr. McCUTCHEON.

I think I burned a ton and a half of coal a year, the value of which at wholesale would be twelve or fourteen dollars.

[**Testimony of D. C. Norcross, for the Government
(Recalled)**].

D. C. NORCROSS, recalled for direct examination for the purpose of laying further foundation for the testimony of the witness, W. H. Tidwell, testified as follows:

The Western Fuel Company had written contracts with the Government of the United States for the supply of coal to transports during the years 1906 to

(Testimony of D. C. Norcross.)

1912, inclusive. The supply of coal by said Western Fuel Company to other vessels belonging to the United States was governed merely by open agreements. The written agreements for the coaling of the transports covered an entire year. I have had my bookkeeper draw off a list of the contract prices of coal furnished the transports under these agreements from year to year. The coal so supplied was average coal, that is to say, coal in the same condition as it would be on importation into the port of San Francisco. The contract price for the fiscal year 1905-1906 was \$6.25 delivered; at the bunkers it was \$5.75, there being a 50¢ lighterage charge. For the year 1906-1907, we did no business, and had no contract with the Government. For the year 1907-1908 the price was \$6.85 delivered, with 65¢ lighterage charge to be subtracted therefrom; for the year 1908-1909, the same; for the years ending June 30, 1910, and June 30, 1911, we had no contract. The last contract we had was for the year ending June 30, 1912, and the contract price for that fiscal year was [410-355] \$6.90, delivered with 50¢ off for lighterage. We had no contract price for the fiscal year 1912-1913.

So far as United States boats, other than transports, were concerned, the average price of coal charged would be about \$6.50 at the bunkers.

The Western Fuel Company had merely verbal agreements with the Pacific Mail Steamship Company for the supply of coal to that company from April 1st, 1906, to and including the year 1912, and

(Testimony of D. C. Norcross.)

that would be true also for the period between January 1, 1904, and April 1, 1906. The price paid by the Pacific Mail Steamship Company changed, I think, three times during those years. I have a record of the prices paid. They were \$5.75 at the bunkers and \$6.25 at the bunkers; when the changes were made I don't recall. 50¢ lighterage would have to be added for the coal when delivered. The kind of coal was average, and, as I have said, there were no written contracts. In a few instances the Western Fuel Company during the same general period of time delivered coal via barges to vessels of the Pacific Mail Steamship Company and of the Oceanic Steamship Company and of the American-Hawaiian Steamship Company. I think the coal to all these companies was sold under open agreements. I think the price paid by these various companies would average \$6.50 at the bunkers, with a lighterage charge of 50¢ to be added at the point of delivery. Other coal sold by us to other vessels would be at approximately the same price.

The office of the Western Fuel Company at Nanaimo from time to time sent accounts to the office of the Western Fuel Company at San Francisco for Nanaimo coal exported from British Columbia into San Francisco. These bills were received at [411—356] the San Francisco office whenever a shipment was made. They were mailed at the time of the shipment. A bill was sent for every carload of Nanaimo coal thus imported into San Francisco, and

(Testimony of D. C. Norcross.)

they have been coming ever since we have been in business.

Q. I call your attention to a bill dated at Nanaimo, B. C., the 25th of October, 1907, "Messrs. Western Fuel Company, San Francisco, California; bought of Western Fuel Co. 3788 tons New Wellington Coal, 3.75, \$14,205. 3866—1420 per SS. Hornelen; charge Coal account S. F. O. K. G. M. M." Do you recall receiving that bill?

A. I don't recall receiving this particular bill. It undoubtedly came to the office, though.

Q. And the figures in black ink, 3788 tons, New Wellington Coal, 3.75, \$14,205, of course, were the figures and the letters upon that bill at the time it was received? A. Yes.

Q. None of the interlineations in red ink were upon the bill at that time? A. No.

Q. And that is the weight of the coal as indicated by the bill sent to the Western Fuel Company's office at San Francisco from its office at Nanaimo; is that correct? A. That is correct.

Q. Showing the weight of coal loaded upon the boat? A. Yes.

Q. The red ink interlineations show the out-turn weight at this port; is not that correct?

A. That is correct. [412—357]

Q. Now, I direct your attention to a letter dated October 28, 1907, and ask you to look at that letter and state whether that letter was received at this office with that bill?

* * * * *

(Testimony of William Chisholm.)

A. It undoubtedly was.

Q. And the figures "3788 tons New Wellington Coal" contained in black ink upon this billhead not only show the weight of coal loaded into the ship but also shows the invoice weight, does it not?

A. Yes.

Q. In other words, those figures in each instance agree with the invoice weight and the bill of lading weight? A. Yes.

Q. Is it not a fact that the Western Fuel Company was charged, as indicated in this letter, with 100 tons more coal than was specified in the bill of lading?

A. It would appear so from that.

The letter last above referred to was presumably received by me in San Francisco, but I do not recall taking the matter presented in it up with any of the officials of the Western Fuel Company. I do not think I received any subsequent bills showing that the Western Fuel Company had been charged with 100 tons more coal than was specified in that bill. I cannot remember asking for any explanation as to why the company should have been charged with 100 tons of coal more than was specified in the invoice or bill of lading. The letter was handed to the book-keeper when it came. I do not remember doing anything else with it. In reply to the question whether there were any books kept by me in my office in which entries were made by me from time to time as to the weight of coal charged against us by [413—358] the Nanaimo office irrespective of the invoice or bill of lading weight, or out-turn weight, I would say

(Testimony of D. C. Norcross.)

that the only weight we took account of down here was the out-turn weight of the Government. In addition to bills which accompanied each shipment of coal from Nanaimo, we received from the Nanaimo office regular monthly statements showing the total amount of coal shipped here from that port during the month. These statements did not show the individual cargoes. They gave merely the total quantity billed to us during the month. These statements were always adjusted to agree with the out-turn weights at San Francisco. The adjustment was made at Nanaimo. We would report back the out-turn weight to them for the purpose of this adjustment, and the adjustment would be made there irrespective of any over-weight or under-weight that might be discovered down here.

(The letter hereinabove referred to was then offered in evidence, and reads as follows:)

“Letter 989a.

“D. C. Norcross,

“Secretary Western Fuel Company,

“San Francisco, Cal.

“Dear Sir:—

“S. S. Hornelen. Please note we have charged you with 3788 tons, 100 tons more than bill of lading figures.

“Yours truly,

“MARK BATES, Jr.,

“Cashier.”

I do not remember ever asking any explanation as to why the Western Fuel Company was charged with

(Testimony of D. C. Norcross.)

100 tons more than was specified in the bill of lading.

[414—359]

Q. In the same bundle of statements or letters, Mr. Norcross, I show you another bill which I suppose will be susceptible of the same explanation.

“Nanaimo, B. C., October 31, 1907.

“Messrs. Western Fuel Company,

“San Francisco, California:

“Bought of Western Fuel Company 5,698 tons New Wellington Coal, 3.75, \$21,367.50.”

And that is changed to read “5,635 tons, 1010 lbs. \$21,132.94 per S. S. Torgenskjold. Consigned to Spreckels Brothers Commercial Company, San Diego, Cal. Charge Coal account S. F. O. K. G. M. M.” San Diego, California.

And here is the letter:

“D. C. Norcross, Esq.,

“Secretary Western Fuel Company,

“San Francisco.

“November 15, 1907.

“Steamship ‘Hornelen.’

“Dear Sir:

“Please note we have charged you with 6,265, 100 tons more than bill of lading figures.

“Yours truly,

“MARK BATES, Jr.,

“Cashier.”

Do you remember receiving that letter?

A. I don’t recall that letter particularly.

Q. Is it not a fact that letters of that kind were received by you from time to time from the Nanaimo

(Testimony of D. C. Norcross.)

office, showing that a larger amount of coal had been placed by the Nanaimo office on these boats than was specified in these letters?

A. It appears that way from these letters, yes.

Q. Do you now state you have no recollection concerning these matters?

A. I stated I undoubtedly received the letters. I cannot recall the particular letters coming in at this time. [415—360]

Q. Don't you remember receiving those letters, Mr. Norcross, at your office down here, and of having conversations in relation to these letters with the defendants, or some of the defendants, in this case, conversations regarding those letters?

A. I cannot recall those letters or where we have so done.

Q. You cannot recall it?

A. No, not at this time.

Q. I will ask you if it is not a fact that upon every bill received from the office at Nanaimo since 1908, to and including 1912, the bill upon its face disclosed that there was more coal placed upon the boat than was specified in the invoice or bill of lading.

A. I know there have been many times differences; whether every bill shows that, or not, I don't know.

Q. And was not that matter ever taken up and discussed?

A. I don't remember of discussing it with any one.

Q. Or by anybody?

A. No, not that I recall.

(Testimony of D. C. Norcross.)

Q. Did you ever endeavor to ascertain why that was done? A. No, I did not.

Q. You knew, did you not, that monthly statements furnished to you from the Nanaimo office contained the actual quantity of coal as specified in the bill?

A. No. I told you that the monthly statements from there contained the same amount that the out-turn weight showed here. They were adjusted to agree with the out-turn.

Q. That is, as I understand it, after a cargo was discharged you would return the out-turn weight to the Nanaimo office, and the statement you would then receive from the Nanaimo office would be in conformity with your out-turn weight. A. Yes.

Q. And did you not ever receive any statement from the Nanaimo [416—361] office outside of these bills showing the actual quantity of coal loaded on those boats from time to time and imported into this port?

A. No, they never sent such a statement.

* * * * *

Q. I direct your attention to a bill dated "Nanaimo, B. C., 26th of September, 1908: Messrs. Western Fuel Company, San Francisco, California. Bought of Western Fuel Company. 5,647 tons New Wellington Coal, 3.75, \$21,176.25. 5,749 tons, 560 lbs.

That is correct, is it not? A. Yes, sir.

Q. So that the out-turn weight here shows that there was at least two tons more coal in that boat than was specified in the invoice or bill of lading

(Testimony of D. C. Norcross.)
weight; is not that correct?

A. It is more than that, it is 102 tons more out-turn than was billed.

Q. Now, I will ask you if it is not a fact that down at the bottom of the bill appears in black type the following: "Actual weight of this cargo 5,822 tons"; that is correct, is it not? A. Yes, sir.

Q. An overage of how many tons?

A. An overage on what?

Q. An overage between the bill of lading or invoice weight and what is here specified as the actual weight. A. 175 tons.

Q. Well, approximately 175 tons, is it not?

A. Yes, 175 tons.

Q. Is it not a fact, Mr. Norcross, that the bill upon its face shows that there was loaded into that vessel 5,822 tons of coal, whereas the bill of lading or invoice which was sworn to before [417—362] the United States Consul showed that there was only 5,647 tons? A. Yes.

Q. And when that coal was discharged in the port of San Francisco there apparently was discharged 102 tons more coal than was specified in the bill of lading or invoice; that is correct, is it not?

A. That is correct.

Q. But less coal by a number of tons than is specified in this bill to have been the actual weight of the coal deposited in the boat? A. Yes.

Mr. ROCHE.—I want to call the juror's attention to this with reference to the table that has been introduced in order to account for these overages. I

(Testimony of D. C. Norcross.)

direct your attention to the table appearing on page 18.

* * * * *

Mr. ROCHE.—This exhibit is already in evidence. On page 18 of Table A of "U. S. Exhibit No. 125" it shows October, the "Torgenskjold," the invoice weight was 5,647 tons; the ascertained or out-turn weight was 5,749 tons, 560 lbs. There was an overage, an apparent excess of coal discharged beyond and above the bill of lading or invoice weight of 102 tons, 560 lbs. I would like to have the jury look at this.

Q. Mr. Norcross, all of the interlineations here in red ink were made here in San Francisco, were they not? A. Yes.

Q. And the 5,749 tons, 560 lbs., below the type-written matter in the bill, indicates the out-turn weight, that is, the custom-house weight in San Francisco upon which the Western Fuel Company paid the United States its customs duties; that is correct? A. Yes, sir.

Q. And the price was likewise changed in red ink at the San [418—363] Francisco office?

A. To show what we paid Nanaimo for the coal.

Q. And the language "Charge coal account, S. F." and "O. K. G. M. M." was likewise written in San Francisco. A. By the bookkeeper.

Q. And at the time the bill was received by you all of the typewriting now appearing on the face of the bill was on the bill, including the statement at the bottom, "Actual weight of this coal, 5822 tons."

(Testimony of D. C. Norcross.)

A. Yes, sir.

Mr. McCUTCHEON.—Mr. Roche, I don't know whether you have developed it, I was looking at this exhibit at the time, but I suppose you realize that in that case the custom-house weights were 102 tons, 560 lbs. in excess of the bill of lading weights.

Mr. ROCHE.—Yes, and that is just the reason why I directed this to the witness' attention, because I wanted to show that as a matter of fact there were only 102 tons in excess placed upon the boat at the time the boat left Nanaimo; in other words, to show that there was no overage, that there was a shortage, although in determining the percentages you were given the benefit of an overage.

* * * * *

I would like to have the jury see, in connection with the exhibit, the bill of lading and the invoice; this is the invoice, sworn to before the American Consul. This is the bill of lading.

Q. Let me ask you this question, Mr. Norcross, while the jurors are looking at that exhibit. If the actual weight of coal laden into that vessel was as it is specified in this bill, 5822 tons, instead of 5647 tons, being the tonnage expressed in that bill of lading and in that invoice sworn to before the American [419—364] Consular official, instead of there being an overage of 102 tons there would be a shortage of about 75 tons, would there not?

A. Naturally.

Q. Well, 73 tons to be exact; is not that correct?

A. Yes, there would be a shortage.

(Testimony of D. C. Norcross.)

Q. There would be a shortage of 73 tons, even though there had been discharged from the vessel at this port the 102 tons in excess of the bill of lading or invoice weight.

A. There would be a shortage between whatever the actual amount of the cargo might have been and whatever was put out.

Mr. McCUTCHEON.—Mr. Roche, in that connection, and for our own information and enlightenment, will you tell us whether you claim the bill of lading weights were correct or incorrect?

Mr. ROCHE.—In this particular instance we claim they were incorrect, because we claim that they put more coal upon the boat than the bill of lading shows.

Mr. McCUTCHEON.—And do you claim that in every other case, where that was not the case, that the bill of lading weights were actually correct?

Mr. ROCHE.—So that there will not be any question about our position, we claim there was at least as much coal placed on the boat as indicated by the bill of lading and the invoice, and in a great many cases there was more coal put on the boat than shown by the invoice or bill of lading, and that statements of overages in a great many instances are not correct, and are in fact shortages.

Mr. McCUTCHEON.—In other words, you claim that the bills of lading invariably show the minimum weight.

Mr. ROCHE.—They at least show the minimum weight. Your own bills show that. [420—365]

(Testimony of D. C. Norcross.)

Mr. McCUTCHEN.—And that the coal on the vessels always weighed at least as much as was indicated by the bill of lading.

Mr. ROCHE.—Yes. It might be well for the jurors to use this bill in connection with the bill of lading and the invoice.

The COURT.—I understood the testimony to be that the figures shown in the invoice and bill of lading are the first figures there in black ink and later scratched out.

Mr. ROCHE.—Yes, your Honor, that is correct—in typewriting.

* * * * *

Q. I call your attention to a bill for the next month, or covering the next month, being a bill dated October 3, 1908, Nanaimo, B. C.; Western Fuel Company, San Francisco, California; Bought of Western Fuel Company. In black typewriting appears the following: "5696 tons, New Wellington Coal, 3.75, \$21,360, per S. S. "Titania." The 5696 tons is stricken out and in red ink is inserted 5725 tons, 890 lbs.; that is correct, is it not? A. Yes.

Q. The price is stricken out and in red ink is inserted "\$21,470.24, charge coal account, S. F. O. K. G. M. M." At the bottom of the bill is likewise in black type, "Actual weight of this cargo 5872 tons." That is correct, is it not? A. Yes, sir.

Q. Showing an overage of about 180 tons, a little less than 180 tons. A. Yes, about that.

Q. There was discharged, according to the figures in red ink which indicates the out-turn or customs

(Testimony of D. C. Norcross.)

weight, 5725 tons, 890 lbs., or about 121 tons more than apparently was in the boat, according to the sworn invoice and the bill of lading; that is correct, is it not? A. 25 tons. [421—366]

Q. About 29 tons, is it not? A. 29 tons, yes.

Q. That is correct, is it not? A. Yes, sir.

Q. As a matter of fact, if the figures at the bottom of the bill indicating the actual weight were in fact the weight of the cargo of coal, instead of there being an overage there would be quite a shortage, would there not? A. Yes.

* * * * *

[Testimony of W. H. Tidwell, for the Government.]

W. H. TIDWELL, on the resumption of his direct examination as a witness, called by the United States testified as follows:

Direct Examination Continued by Mr. ROCHE.

Since I was last on the witness-stand, I have made a careful examination of photographic copies of the books or diaries kept by the defendant Mills relating to an apparent overage of some 70 per cent connected with the barge "Comanche" in October, 1911. A memorandum has been prepared under my supervision covering the entries in the Mills diaries relating to the discharge of this barge at the time above specified.

Q. Just explain the situation from the memorandum which you hold in your hand.

A. It appears that on Friday, October 13, 1911, the barge "Comanche" received 814 tons, 310 lbs., and discharged into the transport "Thomas" 196

(Testimony of W. H. Tidwell.)

tons, 240 lbs., leaving a balance of 618 tons and 70 lbs. in the barge. On October 16th the barge continued to discharge into the steamer "Aorangi," discharging 305 tons, 1750 lbs., making a total amount discharged from the barge of 501 tons, 1990 lbs., and leaving a balance of 312 tons, 560 lbs. in the barge. On [422—367] the 17th, the barge received an additional amount, additional tons, making the total amount received in the barge of 856 tons, 1660 lbs., and continued to discharge into the "Aorangi," making a total discharge from the barge of 580 tons, 210 lbs., leaving a balance of 276 tons, 1450 lbs. On Saturday, the 28th and 29th, the barge had received additional tonnage, amounting to 1433 tons, 1970 lbs., and had discharged a total up to that date of 879 tons, 679 lbs., leaving a balance in the barge of 536 tons, 1290 lbs. On October 30, the discharge was continued—nothing was discharged and nothing received. On the 31st nothing was received; the total discharge amounted to 1199 tons, 1869 lbs., leaving a balance of 234 tons, 101 lbs. in the barge. On November 2d, nothing additional having been received, the discharge continued, with a total of 1394 tons and 93 lbs., leaving a balance of 39 tons, 1887 lbs. in the barge. On the 3d she again received coal, making a total amount received of 2059 tons, 2030 lbs.; and discharged a total of 1585 tons, 1339 lbs., leaving a balance of 474 tons, 691 lbs. On the 4th the discharge was continued, making a total amount discharged of 1757 tons, 1451 lbs., the balance being

(Testimony of W. H. Tidwell.)

302 tons, 579 lbs. in the barge.

* * * * *

On the 8th the totals were dropped, and the balance of 302 tons, 579 lbs. carried forward as having been received from the steamer "Thor." On the same date 100 tons, 565 lbs. were laden into the vessel "Lukenbach," leaving a balance of 202 tons and 14 lbs. On the 18th she received an additional amount, making the total in the barge at that particular time—not at that particular time, either, but the total in the barge having been received since the 8th, of 635 tons, 1649 lbs., and discharged into the "Kansas City" 41 tons, making a total [423—368] discharge of 141 tons, 565 lbs., or a balance of 494 tons, 1084 lbs., in the barge at the close of business on that particular day. On the 20th she had not received any additional tonnage, but had discharged a total of 393 tons, 1772 lbs., leaving a balance of 242 tons 2117 lbs. On the 21st no additional tonnage had been received, but the discharge was continued, making a total discharge of 446 tons, 17 lbs., or a balance of 189 tons, 1632 lbs., in the barge. On December 1st she had received 725 tons, 1649 lbs., and discharged 745 tons, 17 lbs. On December 2d—

Mr. McCUTCHEON.—(Intg.) When you say, on December 1st she had received, you gave a quantity of coal on the barge as something like 100 and odd tons, did you not? When did she get the additional coal to make 725 tons, 1649 lbs.?

A. The balance was 302 tons, 579 lbs.

(Testimony of W. H. Tidwell.)

Q. I am not talking about that; I am talking about the coal received.

A. Well, she received from the offshore bunkers on the 18th, 96 tons, 1700 lbs.; from the offshore bunkers on the same date, 24 tons, 390 lbs.; from the "James B. Smith" 212 tons, 1160 lbs., making a total of 635 tons, 1649 lbs.

Q. Does that total include the 302 or is it exclusive of it? A. It includes it. * * *

And on December 1st she received 90 tons more from the offshore bunkers, making a total received of 725 tons, 1649 lbs., with a total discharge up to that date of 745 tons and 17 lbs. The discharge was continued on the 2d with a total of 1071 tons and 37 lbs.; up to and including December 4th, the date on which the cleanup was made, it appeared that she had received 725 tons, 1649 lbs., and discharged 1244 tons, 1767 lbs., or 519 tons and 118 lbs. more than had been received, but [424—369] that 519 tons and 118 lbs. represents the overage on the total amount received in the barge of 2483 tons and 860 lbs.

Q. Or what percentage?

A. About 21 per cent.

Mr. McCUTCHEON.—There is some little difference between that and 70 per cent, isn't there?

Mr. ROCHE.—That is correct.

I have compiled a table showing the total quantity of coal laden upon these various barges owned or controlled by the Western Fuel Company between January 1st, 1904, and December 31st, 1905, and a

(Testimony of W. H. Tidwell.)

table showing the discharge of that coal from the barges into particular boats, showing also the weight of the coal at the point of discharge and the overage where an overage existed between the weight taken at the time the coal was checked into the barge and the supposed weight of the coal at the point of delivery.

Q. Now, this table to which you have just referred shows all coal laden upon the barges and discharged from the barges between the first of January, 1904, and the 31st of December, 1905, and when I say "coal" I am referring, of course, to foreign coal; that is correct, is it not?

A. Yes, sir, according to the books of the defendant Mills.

Q. That is compiled from the books kept by the defendant Mills, is it? A. Yes, sir.

Q. And which books are already in evidence.

A. Yes, sir.

Q. I would like to have you state the quantity of coal which was discharged into the barges according to weight upon which the coal was checked into the barges. Let me have the [425—370] weight for 1904?

A. For 1904 the total debits or amount laden on the barge, amount to 99,944 tons, 2210 lbs.

Q. What was the weight of that same coal at the point of discharge; that is, when it was discharged from the barges during the year 1904?

A. 104,205 tons, 409 lbs.

Q. Upon what portion of that coal were drawback

(Testimony of W. H. Tidwell.)

duties paid by the United States Government?

A. That I can not answer; I don't know the total amount. I know they differed.

Q. For the year 1904. Your table shows that, does it not, Mr. Tidwell?

A. No, it does not show that, Mr. Roche—yes, it does; it does not show the total amount of drawback paid there, it shows the difference.

Q. Does it not show the amount upon which drawbacks were paid as well as the amount upon which drawbacks were not paid?

A. It shows the difference.

* * * * *

Q. This statement, Mr. Tidwell, was compiled by you the same as was compiled Table "C" in U. S. Exhibit 125? A. Yes, sir.

Q. And the various pages of this exhibit, excepting these pages upon which are set forth the summaries of figures already contained, disclose the name of the barge upon which the coal was checked and laden; that is correct, is it not?

A. Yes, sir. [426—371]

Q. And the source from which the coal was obtained? A. That is true.

Q. And the particular boat or vessel into which the coal was subsequently discharged?

A. That is true.

Q. Where there was a drawback, the registered number of the drawback, and the quantity of coal for which the drawback was made; is that correct?

A. Yes, sir, that is true.

(Testimony of W. H. Tidwell.)

Q. Or, rather, for which the claim was made?

A. That is true.

Mr. McCUTCHEON.—Now, upon that explanation, we have not any objection to that paper going in for what it is worth.

Mr. ROCHE.—All right.

Q. Now, I would like to have you testify, Mr. Tidwell, what the excess weight of the coal was discharged from these barges, as compared with the weight of coal checked into the barges during the year 1904?

A. For the year 1904, that is not tabulated—yes, I can get that here by adding the two figures.

Q. I will withdraw that question and direct your attention to both years, because you have taken both years together, have you not?

A. Yes, sir, the whole thing has been treated as one, it is just in one statement.

Q. You have testified that in 1904 there was checked into the barges 99,944 tons, 2210 pounds of coal; during 1905, what quantity of coal was checked into these barges?

A. In 1905 there were checked in 107,364 tons, 982 pounds.

Q. Making the total for both years, 1904 and 1905, of how much? A. 207,309 tons, 952 pounds.

Q. That was the quantity of coal checked into the barges?

A. Into the barges, yes, sir. [427—372]

Q. You have already testified that during the year 1904 there was discharged from these same barges

(Testimony of W. H. Tidwell.)

apparently 104,205 tons, 419 pounds of coal; that is correct, it is not? A. Yes, sir.

Q. What tonnage of coal was discharged from the same barges during the year 1905?

A. 113,149 tons, 1680 pounds.

Q. Making a total of what quantity of coal discharged from the barges for the two years, 1904 and 1905? A. 217,354 tons, 2099 pounds.

Q. What was the excess quantity of coal discharged from those barges during those two years, that is, the quantity of coal in tons and pounds in excess of the quantity of coal which, according to the books of the defendant Mills, was checked into the barges? A. 10,045 tons, 1147 pounds.

Mr. ROCHE.—Q. Part of the table which you have prepared here, Mr. Tidwell, shows or undertakes to show, upon what quantity, or upon what quantity of that excess, drawback claims were presented and what quantity of that excess went into boats upon which no drawback claims were made; how did you arrive at those figures?

A. Where there were two or more vessels by proportioning the amount of overage between the particular vessels.

Q. That is, in proportion to the quantity of coal which the vessel took; is that correct? A. Yes, sir.

Q. And you assumed, of course, proportionately, that there was as much of the excess went into one boat as into the other? A. Yes.

Q. In view of the explanation which you have just made, Mr. Tidwell, what was the result of the calcu-

(Testimony of W. H. Tidwell.)

lation which you have just made with reference to that part of this excess as to which drawback [428—373] claims were presented and that part as to which no drawback claims were presented?

A. On which drawback was paid, it amounted to 6927 tons, 1812 pounds; and on which drawback was not paid,—there are two items here, on a transport, 332 tons, 2027 pounds, and on other vessels 2784 tons, 1788 pounds.

Q. If you will examine the preceding page, Mr. Tidwell, you will see that those figures are specified upon that page standing alone.

A. Yes, I remember that now. Without drawback, 3117 tons, 1575 pounds. With drawback, 6927 tons, 1812 pounds.

Q. Did you make an examination of the books of the defendant Mills for the purpose of determining from those records what proportion of the coal discharged from these barges was laden upon the boats of the Pacific Mail Steamship Company, and what quantity was laden upon boats of the Oceanic Steamship Company, and what quantity was laden upon boats of the American-Hawaiian Steamship Company, and also upon boats belonging to other companies, as well as upon United States transports and other Government vessels?

A. Yes, sir.

Mr. McCUTCHEON.—That is all set forth in the exhibit, is it not?

Mr. ROCHE.—Yes. Q. Just state, from the record which you have before you, Mr. Tidwell, which is the table to which your attention has been called,

(Testimony of W. H. Tidwell.)

what proportion of this coal was deposited into those various boats?

A. Pacific Mail Steamship Company, 5424 tons, 265 pounds.

Q. These figures relate, do they not, exclusively, to excess tonnage? A. To excess tonnage alone.

Mr. McCUTCHEON.—And they are arrived at in the way the [429—374] witness has heretofore explained?

Mr. ROCHE.—Yes, that is correct; that is, they are arrived at in the same manner as has been explained by the witness, unless the total quantity of coal checked in or laden upon the barge was subsequently discharged into one or more vessels of the Pacific Mail Steamship Company. That is correct.

A. (Continuing.) Oceanic Steamship Company, 1263 tons, 314 pounds. This is all with drawback. American-Hawaiian Steamship Company, 240 tons, 829 pounds.

Q. It is a fact, is it not, that the boats of these various companies, whose names you have just given us, are American registered vessels, and when coal for fuel purposes is discharged into those boats they are entitled to claim drawback duties?

A. Yes, sir.

Q. What quantity of excess coal was, according to this calculation of yours, discharged into United States transports? A. 332 tons, 2027 pounds.

Q. By the way, will you also give to us the total quantity of coal, that is, the total quantity of this excess tonnage which, according to your calculation, was discharged into all of the boats of the Pacific

(Testimony of W. H. Tidwell.)

Mail Steamship Company, the Oceanic Steamship Company, and the American-Hawaiian Steamship Company?

Mr. McCUTCHEON.—Is not that in the total he has already given?

Mr. ROCHE.—Yes.

A. Yes, 6,927 tons, 1812 pounds.

Q. What proportion of that excess tonnage was discharged into vessels without the benefit of drawbacks, that is, vessels other than those belonging to the companies to which you have already testified, and other than United States transports, and United [430—375] States vessels?

A. 3117 tons, 1575 pounds.

Q. That relates to excess tonnage for both years?

A. Yes, sir.

Q. Have you the figures before you showing the amount paid by the United States Government upon that portion of the excess tonnage upon which drawback claims were made?

Mr. McCUTCHEON.—That is to say, upon which he assumes drawback claims were made.

Mr. ROCHE.—That is to say, assuming the witness' calculation is correct.

A. Yes, sir.

Q. And you have them divided so as to show the price under the tariff act of 1897 and the tariff act of—

A. (Intg.) It is all under the tariff act of 1897.

Q. Oh, yes, that is correct. What is the amount?

A. \$4,641.63.

(Testimony of W. H. Tidwell.)

Q. You have made a calculation, have you not, as to the value of the excess tonnage which, according to your calculation was laden upon the United States army transports, at \$7 a ton?

A. Yes, I have, amounting to \$2331.

Mr. McCUTCHEON.—And that brings down the total amount due the Government as how much?

Mr. ROCHE.—The total amount due the Government alone upon the excess tonnage, \$6972.63.

Mr. McCUTCHEON.—You say "alone" upon the excess tonnage—what do you mean?

Mr. ROCHE.—I say due to the Government alone.

Q. You have not as yet made any calculation, so far as this table is concerned, showing the value of excess tonnage claimed to have been discharged into the boats of the Pacific Mail Steamship Company and these other boats, have you? [431—376]

A. No, I have not, except as to the question of drawbacks.

Mr. ROCHE.—At this time, may it please the Court, I offer this additional table "C" in evidence.

(The document is here marked "U. S. Exhibit No. 130.")

Q. I want to call the witness' attention to some of the figures where were testified to before court adjourned some days ago, for the purpose of asking him about a calculation. Mr. Tidwell, you will recall testifying that according to the total coal sold from the first of April, 1906, to and including the 31st day of December, 1912, taking into consideration the coal on hand on that day, there was sold 61,966

(Testimony of W. H. Tidwell.)

tons, 1374 pounds of coal in excess of the coal received during the same period, including coal on hand on the first day of April, 1906; you recall that testimony, do you not? A. I do.

Q. That, of course, includes some 300 tons of coal burned, as you will remember, during the month of October, 1908? A. 356 tons, I think it was.

Q. You will also recall testifying from figures set forth in Table "C" of United States Exhibit No. 125, that there were 33,223 tons, 542 pounds more coal weighed out of the barges than was apparently checked in; you remember that, do you?

A. Yes, I do.

Q. And that is correct, is it not?

A. That is correct. [432—377]

Q. So that, assuming the first calculation to be correct, and that is that the total excess of coal sold above the coal received and on hand, amounting to 61,966 tons, 1374 pounds, and the excess coal discharged from the barges, amounting to 33,223 tons, 542 pounds, the excess coal sold during that same period of time, other than the coal from the barges, would amount to 28,743 tons, 832 pounds; will you just make that calculation, please, so that you can testify to it in the record?

A. Yes, sir; 28,743 tons, 832 pounds.

Q. That represents the excess tonnage that is not accounted for by the discharge of coal from barges; is not that correct? A. Yes.

Q. Did you ascertain from the books and records of the Western Fuel Company that during this

(Testimony of W. H. Tidwell.)

period of time coal was delivered from time to time to some of the United States army posts in and about the bay? A. Yes, sir.

Q. From your examination of the records kept by the defendant, Mills, no part of the coal that was checked on to these barges was subsequently discharged at any of these posts, was it?

A. I don't recall any.

Q. Assuming that your calculation is correct, that is, the calculation shown by your Exhibit "B," in which the coal sold above the coal received is set forth, I would like to have you multiply the 61,966 tons plus by the value of coal as testified to by Mr. Norcross—about \$6.50.

A. I will take the round numbers, 61,966 tons, will I?

Q. Yes. A. \$402,779.

* * * * *

Q. Now, turning to the table which you have in your hand, being table C of United States Exhibit No. 125, what quantity of such [433—378] excess, according to your calculation—I will withdraw that question and put it in this way: Are the calculations which are set forth in Table C of United States Exhibit No. 125 made upon the same method as pursued by you in making the calculations set forth in the supplementary Exhibit "C," to which your attention has heretofore been attracted?

A. Exactly the same, yes, sir.

Q. That is, in those instances where the coal checked upon the barge was subsequently discharged

(Testimony of W. H. Tidwell.)

into one or two boats with benefit of drawback, of course, you would know exactly upon what quantity of coal the drawback claim was based? A. Yes.

Q. And when part of it was discharged into boats having the benefit of drawback and into other boats without that benefit, you would pro-rate that upon the quantity of coal laden upon the respective vessels?

A. Yes, sir; that is, we would pro-rate the excess.

Q. Upon what part or portion of the 33,223 tons 542 pounds excess coal discharged from these barges according to your calculations were drawback claims made and paid by the United States Government?

* * * * *

A. Under the tariff act of 1897, 12,533 tons, 1135 pounds; under the tariff act of 1909, 9902 tons, 1334 pounds; a total of 22,436 tons, 229 pounds.

Mr. ROCHE.—Q. What portion of the excess, according to your calculations, was discharged into United States transports?

A. 1196 tons, 1109 pounds.

Q. And into United States revenue cutters?

A. 57 tons, 1736 pounds. [434—379]

Q. What portion of that excess of tonnage was discharged into boats without benefit of drawbacks, other than United States transports and United States Government boats:

A. 9,532 tons, 1948 pounds.

Q. Did you make a calculation for the purpose of determining the amount in money that was paid back by the Government upon these drawback claims under the tariff act of 1897 and the tariff act of 1909?

(Testimony of W. H. Tidwell.)

A. Under the tariff act of 1897 they paid \$8397.45; under the tariff act of 1909, it returned \$4,456.16.

Q. What was the total amount thus paid back upon that excess tonnage representing drawbacks?

A. I have to have that.

Q. Well, I have it here; you can verify it. It is \$12,853. 61. That may be inaccurate, because it is my own calculation. A. That is correct.

Q. Did you make a calculation, or was any calculation made by you representing the value of the excess tonnage, assuming your calculations to be correct, laden upon the United States transports and the United States revenue cutters?

A. Yes, sir; on United States transports, 1196 tons, 1109 pounds, estimated at \$7 per ton, \$8,375.50; on revenue cutters, 57 tons, 1736 pounds, estimated at \$7 per ton, \$404.25.

Q. Making a total of what? I will give you the addition; \$8779.75, is that correct? A. Yes, sir.

Q. I would like to have you add the figures to which you have just testified, representing the value of excess coal laden upon the United States transports and revenue cutters and the quantity of drawbacks paid by the United States Government upon that portion of the excess tonnage to which you have just testified.

[435—380]

Mr. McCUTCHEON.—You might as well read the figures, Mr. Roche.

Mr. ROCHE.—I will state the figures, and if there is any inaccuracy in them they can be corrected hereafter. \$21,633.36.

(Testimony of W. H. Tidwell.)

Q. Does the table which you hold in your hand show what portion of this excess tonnage was laden upon boats belonging to the Pacific Mail Steamship Company, what portion upon boats belonging to the Pacific Coast Steamship Company, what portion upon boats belonging to the Oceanic Steamship Company, and what portion upon boats belonging to the American-Hawaiian Steamship Company?

A. Yes, sir. There are two items for the Pacific Mail Steamship Company, on account of the different rates of the drawbacks. The Pacific Mail Steamship Company, 11,129 tons, 1825 pounds, at 67 cents a ton.

Q. That is under the tariff act of 1897?

A. The tariff act of 1897, yes; \$7456.98. Under the tariff act of 1909, 9,888 tons, 2187 pounds, at 45 cents, \$4,450.04. The Oceanic Steamship Company, all under the tariff act of 1897, 1,270 tons, 2166 pounds, at 65 cents, \$851.35. The American-Hawaiian Steamship Company, under the tariff act of 1897, 132 tons, 1624 pounds, at 67 cents, \$88.92. Pacific Coast Steamship Company, 13 tons, 1387 pounds, under the tariff act of 1909, at 45 cents, \$6.12.

Q. Do you know, or can you now ascertain what the total quantity of this excess is which was, according to your calculations or figures, deposited in these various steamers and these other steamers, the names of which you have not given us?

A. I don't understand the question. [436—381]

Q. Let me put it this way: You testified a few moments ago that the sum of 9,532 tons, 1948 pounds

(Testimony of W. H. Tidwell.)

represented that portion of this excess quantity of coal which was laden into vessels other than vessels with the benefit of drawbacks; do you recall that?

A. You mean in this statement here?

Q. Yes. A. Yes, that is correct.

Q. I would like to have that portion of the excess tonnage added—

A. (Intg.) 9532 tons, 1948 pounds.

Mr. ROCHE.—Mr. McCutchen is willing to permit me to state the additions, and if they are incorrect they can be corrected hereafter. Q. Taking into consideration the 9,532 tons, 1948 pounds of coal discharged into vessels without the benefit of drawback and the coal discharged into the vessels of the Pacific Mail Steamship Company, the Oceanic Steamship Company, the American-Hawaiian Steamship Company and the Pacific Coast Steamship Company, to which the witness has just testified, the total excess tonnage represented by those vessels would amount to 31,968 tons, 2177 pounds. I would like to have you multiply, Mr. Tidwell, those figures, 31968 tons plus, representing the excess tonnage to which I have just referred, by \$7.

* * * * *

A. \$223,776.

I visited Nanaimo in 1913, and spent about two days there, I believe. I examined the properties of the Western Fuel Company there exclusive of the mines. I visited the scales-house. My visits to these properties were two in number. On my first visit I went to where the cars start off to the bunkers on a

(Testimony of W. H. Tidwell.)

trestle. I went out to the bunkers and located the place where [437—382] the ships come to the bunkers for the purpose of receiving coal. I noted the general condition of the bunkers at that time; also I noted there the blacksmith house and some houses back some distance from the chutes where the vessels receive coal. Later I made a trip down as far as the hoist, the office of the Western Fuel Company, and observed the properties there, including the tracks and the scales. I found that there were two kinds of cars, large and small, and my remembrance is that there were two scales on the tracks, one on either side. My recollection is that there were two scales, one on the right-hand side of the tracks, and one on the left-hand side of the tracks. No coal was being discharged while I was at Nanaimo, because there was a strike on at the mines, and there had been for some week or ten days. I should say the scales-house was located about a quarter of a mile from the bunkers and docks.

I have testified to the excess tonnage discharged from the barges in the years 1904 and 1905, the figures having been ascertained by me from the books kept by the defendant Mills, which were practically the only records furnished to me covering those two years. I have been informed that the other records were destroyed in the conflagration of 1906. In view of this destruction of records it was impossible for me to determine what the entire sales of foreign coal by the Western Fuel Company for the years 1904—1905 in excess of the quantity of foreign coal received during those years were. I have testified to the en-

(Testimony of W. H. Tidwell.)

tire sales of coal from April 1st, 1906, to December 31, 1912, in excess of coal received, considering, of course, coal on hand. Now, adding the excess tonnage discharged from the barges for the period 1904-1905 to said above mentioned total excess sales for the period from April 1st, 1906, to December 31, 1912, the aggregate [438—383] excess tonnage would be 72,011 tons and some odd pounds. Assuming that that coal could be sold for approximately \$7 a ton, its value would be \$504,077, representing the value, therefore, of the excess tonnage for the period from January 1, 1904, to December 31, 1912, not taking into consideration, of course, any excess tonnage existing during the years 1904 and 1905, except the excess tonnage discharged from the barges.

I recall making an examination of the monthly sheets which have been introduced in evidence showing the receipt and sale of coal. In a number of instances said sheets show a certain amount of coal was taken up as overrun ex-barges, and overrun ex-stock. In other instances mention is simply made of an overrun, without specifying how it occurred. On the sale sheet there were several from Oakland that allowed overrun of coal which were taken up as other coal. The fact, however, that there was an overrun is shown upon the face of the statement.

The "Germanicus," as I recall from my investigations, was discharged in the latter part of 1905.

Mr. ROCHE.—We at this time offer in evidence the invoice relating to the cargo carried by the steamship "Germanicus" in August, 1905.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—No objection.

Mr. ROCHE.—I do this preliminarily. We will offer further proof as to it before the Government closes its case. I only desire to direct the jury's attention to part of this invoice. The invoice is numbered 9906. The bill of lading is dated August 10, 1905, issued by the Wellington Colliery Company, Limited, Wellington Coal, Ladysmith, British Columbia. Shipped in good order by Wellington Colliery Company, Limited on board the S. S. "Germanicus," whereof W. Berndt is Master and [439—384] bound for San Francisco, 5970 tons, Wellington lump coal, the dangers of fire and navigation excepted, consigned to Western Fuel Company, San Francisco. The consumption entry is as follows: "Consumption Entry. Entry of merchandise imported by Western Fuel Company in the German steamer 'Germanicus' whereof Berndt is Master, from Ladysmith, on the 15th day of August, 1905." It shows that the invoice weight was 5950 tons of coal, value \$23,800. The 5970 is stricken out, in red ink and immediately underneath in red ink are placed the figures 5603. Those figures are again stricken out in red ink and immediately underneath that is replaced in red ink 5950 tons, representing the invoice weight. Now, immediately under the figures and language 5950 tons coal, \$23,800, being the invoice tonnage and the value of the coal at invoice tonnage, is the following entry in red ink: "Reliq. to correct error in weights."

Q. That means "reliquidation," does it not, Mr.

(Testimony of W. H. Tidwell.)

Tidwell? A. Reliquidation, yes.

Mr. ROCHE.—Then in red ink below the interlineation to which I have already referred are the following insertions: "23,800"; that refers to the value of the cargo; "67 cents, \$3986.50"; indicating the duty. Near the bottom at the right-hand corner of this entry is the following insertion: "Deposit \$3986.70, refund, \$232.49, \$3754.01." Reliq., referring to reliquidation, \$3754.01, and that is stricken out and above that is inserted \$3986.70. "Due U. S. \$232.49; duty paid August 15, 1905."

* * * * *

Mr. ROCHE.—The invoice itself reads as follows: "Invoice, August 10, 1905; invoice of coal consigned to Western Fuel [440—385] Company at San Francisco for sale account of blank, shipped by Wellington Colliery Company, Limited, per steamship "Germanicus" Number and remarks, 5970; description, coal; Consular certificate; bituminous; 415 is written in red ink; value \$4.00; amount \$23,800; the certificate costing \$2.50, makes a total of \$23,802.50; 67 cents, referring to the duty, per ton; August 21, 1905, merchandise as noted, amount \$23,800, E. J. E., John Dare, Appraiser."

The certificate of delivery of imported merchandise is part of the invoice and may likewise be considered as having been read into the record?

Mr. STANLEY MOORE.—Certainly.

* * * * *

Mr. ROCHE.—Will you admit, so as to avoid the necessity of explaining the invoice and consumption

(Testimony of W. H. Tidwell.)

entry which we have already offered in evidence, that it discloses upon its face that there was a shortage, an apparent shortage of 347 tons, 110 lbs.?

Mr. STANLEY MOORE.—Whatever is the fact.

Mr. ROCHE.—It is the fact, and that was reliquidated and upon reliquidation the invoice weight was ascertained and the duty paid upon the invoice weight.

Mr. STANLEY MOORE.—We will admit that there was a very large shortage in the case of that vessel, in the neighborhood of 400 tons, and that the duty was paid, and the matter was adjusted upon the invoice weight.

Mr. ROCHE.—In other words, notwithstanding the shortage of approximately 400 tons, which you have just indicated, the weights were liquidated and the customs duties paid upon the invoice weights. Is that right? [441—386]

Mr. STANLEY MOORE.—Yes.

Mr. ROCHE.—Will you mark that, Mr. Clerk; it will be “131.”

(The document was marked “U. S. Exhibit No. 131.”)

* * * * *

Mr. ROCHE.—We also desire to offer in evidence, may it please the Court, the invoice, bill of lading and consumption entry relating to the steamship “Dumbarton,” likewise conveying a cargo from Ladysmith; she arrived here on the 29th of August, 1905; that is during the same month during which the “Germanicus” arrived and was discharged. I

(Testimony of W. H. Tidwell.)

suppose this may be considered as having been read.

Mr. STANLEY MOORE.—The same may be considered as having been read.

Mr. ROCHE.—Now, may it please the Court, without reading this in detail to the jury, I suppose you will concede that when this coal was weighed there was an apparent shortage of a little over 400 tons; I believe about 409 tons.

Mr. STANLEY MOORE.—My recollection is that it was about that, and the same stipulation will be made affecting that matter too, if your Honor please, that the duties were paid upon the invoice weights instead of the custom-house or out-turn weights.

* * * * *

Mr. ROCHE.—It is admitted that notwithstanding the fact that there was a shortage of approximately 409 tons below the invoice or bill of lading weight, that the Western Fuel Company paid to the United States Government duties upon the invoice weight.

Mr. STANLEY MOORE.—Yes, we will admit that again.

Mr. ROCHE.—Conceding the invoice weight to be correct? [442—387]

Mr. STANLEY MOORE.—Yes, or it was the best that could be done.

Mr. McCUTCHEON.—There is no concession about it.

Mr. ROCHE.—The duty was paid upon the assumption then that the invoice weight was correct and the discharge weight was incorrect. I will ask that this be marked U. S. Exhibit 132.

(Testimony of W. H. Tidwell.)

(The document was marked "U. S. Exhibit No. 132.")

I desire, may it please the Court, the invoice relating to the cargo shipped on the steamship "Carlton" during the month of September, 1903; she discharged here in March, 1904. And I suppose this may be considered as read. This is only important in connection with some evidence that may hereafter be offered.

Mr. STANLEY MOORE.—Yes, your Honor, it may be deemed to have been read.

Mr. ROCHE.—And you will concede, will you, that there was an apparent shortage of about 66 tons in this particular case?

Mr. STANLEY MOORE.—Well, whatever the fact may be. What was the total of the cargo?

Mr. ROCHE.—The shortage in this case was approximately a little over 66 tons. The invoice shows that the bill of lading weight was 2680 tons. The invoice likewise shows that the out-turn weight as indicated upon the Consumption Entry was 2613 $\frac{3}{4}$ tons. Only a part of this cargo was discharged at San Francisco by the Western Fuel Company.

* * * * *

(The document was here marked "U. S. Exhibit No. 133.")

Cross-examination by Mr. McCUTCHEON.

I began my investigation in the latter part of August [443—388] or the first of September, 1912. I think the first indictment found against the defendants in this case was in March, 1913. So far as I

(Testimony of W. H. Tidwell.)

know the defendants had no knowledge of the fact that they were being investigated, or that the business of the Western Fuel Company was being investigated by the Government from the first of September, 1912, until the finding of these indictments.

According to my Table A, the Western Fuel Company discharged coal from the following vessels during the month of September, 1912: the "Ikalis"; the "Thor"; the "Heckla"; the "Kokohead"; the "Titania"; the "Wellington," and the "Lord Curzon." My Table A does not show the places of discharge. The records of the custom-house show the docks at which the ships were discharged, but I did not examine the records with that item in mind, though I could have ascertained it if I wished to when I was going over the records. The invoice weight of the "Ikalis" on the voyage above referred to was 6430 tons; the ascertained weight 6197 tons, 130 pounds. The invoice weight of the "Thor," 7293 tons; the ascertained weight, 7094 tons, 1300 pounds. The invoice weight of the "Heckla," 2127 tons; the custom-house weight, 2077 tons, 520 pounds. The invoice weight of the "Kokohead," 1931 tons, and the custom-house weight 1902 tons, 610 pounds. The invoice weight of the "Titania" was 4029 or 4829 tons; the custom-house weight, 4771 tons, 2040 pounds. The invoice weight of the "Wellington," 2304 tons; the custom-house weight, 2317 tons, 1240 pounds. The invoice weight of the "Lord Curzon," 4897 tons; the custom-house weight, 4894 tons, 1500 pounds. That was all of the full cargoes during the month of September.

(Testimony of W. H. Tidwell.)

From my investigation of the custom-house records, the places in California where cargoes were discharged by the Western [444—389] Fuel Company were, as I recall, San Francisco, Oakland, Eureka, Santa Barbara, Los Angeles and San Diego. My exhibit "A" in some instances, but not in others, purports to show where the discharge was made. If a cargo was discharged at San Diego, the word "S. D." so indicates. For Los Angeles and Santa Barbara, I think the entries would be made at Los Angeles. Five cargoes seem to have been discharged in the month of October, 1912. In three instance, according to Table A there was a shortage, and in two instances an overage. In November four cargoes were discharged. I do not find any initials to indicate that there were discharges at other places than San Francisco. Some of them may have been discharged at Oakland, or, at any rate, parts of their cargoes may have been there discharged. They would not necessarily have been discharged under the same weigher at Oakland as at San Francisco, for the reason that weighers, I know by actual experience, are sometimes changed from day to day. In November there are three cases of shortages. Four cargoes were discharged in December, 1912. In two cases I find a shortage, according to Table A, and in two cases an overage. The month of January is not included in Exhibit "A." I did not examine the custom-house records for that month, my statement running from April, 1906, to December 31, 1912.

Q. Why did you not make an investigation for that month?

(Testimony of W. H. Tidwell.)

A. I preferred to check with the records of the Western Fuel Company, against them as well as the custom-house records. I wanted to be perfectly fair to the Western Fuel Company as well as to the Government.

Q. You always have had a desire to be fair to the Western Fuel Company, I suppose?

A. I have. [445—390]

Q. Do you know whether in the course of the preparation of their defense the defendants desired to examine some records of the custom-house?

A. I do.

Q. Did you object to their examination of those records? A. I did.

Q. Was that with the notion of being fair to the defendants? A. It was.

Q. That was your idea of fairness to the defendants, was it?

A. Because the defendants would not permit us to see their records.

Q. That was the reason that you objected to these defendants having access to the public records in the custom-house, was it? A. Yes, sir.

Q. And that was the only reason? A. Yes, sir.

Q. Had you access to the records of the Western Fuel Company before that time?

A. Some of them.

Q. When did you prepare Exhibit "A"?

A. As soon after the company was required to produce the books before the Grand Jury as I could; I commenced say in February, 1913.

(Testimony of W. H. Tidwell.)

Q. You commenced in February, 1913; how long did you continue?

A. Well, I cannot state the exact time which was required to prepare Exhibit "A," but on the entire records there were some two months I should say consumed.

Q. Where did you make your examination during those two months?

A. In what respect do you mean?

Q. In any respect—your examination of the records? A. You mean Exhibit "A"?

Q. No. I mean your examination of the records of the Western Fuel Company? [446—391]

A. Part of it was made at the office of the Western Fuel Company and the other at the custom-house.

Q. That is to say, you took some of the records of the Western Fuel Company to the custom-house?

A. I did.

Q. With the consent of the Western Fuel Company?

A. After they had been required to produce them before the Grand Jury.

* * * * *

Mr. McCUTCHEON.—Q. You did take the books to the custom-house, did you? A. I did.

Q. How long did you have them there?

A. Until I completed the preparation of these statements.

Q. How long did you have them there?

A. I don't know.

Q. About how long did you have them there?

(Testimony of W. H. Tidwell.)

A. A couple of months.

Q. How many men did you have at work on them during that time?

A. Well, I should say altogether that I had 6 or 8.

Q. Did you ask for any record while you were conducting that examination which was not produced to you?

A. I did, but they were finally produced, after it was stated to Mr. Olney, I believe, that the matter would be again called to the attention of the Grand Jury.

Q. You got the records nevertheless? A. Yes.

Q. Did you finish that examination without having every record of the Western Fuel Company which you requested to be produced?

* * * * *

A. In connection with all these records I had all that I asked for for the preparation of these statements.

Q. Did you request at that time, while you were conducting that examination of the books of the Western Fuel Company, the production [447—392] of any record that was not produced to you?

A. For an examination of these records, no.

Q. Was it before or after you had made that examination that you objected to these defendants having the privilege of examining the public records of the United States in the preparation of their defense? A. I think it was after.

Q. It was after; then after you had had full access to the records of the Western Fuel Company, you did

(Testimony of W. H. Tidwell.)

object to these defendants being permitted to examine the public records of the United States in the preparation of their defense, did you?

* * * * *

A. I had not had full access to the records of the Western Fuel Company.

* * * * *

Q. Will you specify any record which you had requested the privilege of examining and which had not been produced to you at the time the defendants sought to examine the public records of the United States and you prevented them from doing so?

A. The ledgers of the Western Fuel Company, for instance, and its vouchers for expenditures; also its donations of money and coal and other things to the employees of the Toyo Kisen Kaisha as well as the Pacific Mail Steamship Company.

Q. Now, tell us one voucher for which you requested the production and which had not been produced to you at the time you made objection to the defendants examining the public records of the United States for the purpose of preparing their defense.

A. I made no specific request for any particular voucher; all vouchers were requested.

Q. To whom did you make that request?

A. It was made in a subpoena that was issued to the Western Fuel [448—393] Company to produce the records.

Q. Now, Mr. Tidwell, I asked you whether you had asked for any voucher and I understood you to say

(Testimony of W. H. Tidwell.)

you had not; did you ask any officer or representative of the Western Fuel Company to produce any voucher which he failed to produce for you?

A. Not finally, no.

Q. What do you mean by finally?

A. After the various proceedings in court.

Q. I am talking about the time before you concluded this examination and during the time you were preparing Exhibit "A"; just confine yourself to that.

A. Then if you go back to that time, I answer no.

Q. You answer no. A. I do.

Q. You had not then, up to the time you finished these three exhibits, requested the production of any paper which the Western Fuel Company had not produced for you? A. That is true.

Q. Then, after you had finished these papers and before you had made any other requests, and while these defendants were preparing their defense to these indictments, did you object to their right to inspect the public records of the United States?

A. I did.

Q. And you say that you did that in the interests of justice? A. I did.

Q. Will you explain how that was in the interests of justice.

A. I did not propose that they should have the benefit of the Customs records if we could not have the benefit of their records.

Q. Then, when you stated that you refused to allow them to examine the public records and they re-

(Testimony of W. H. Tidwell.)

fused to let you have their records, you were mistaken, were you not? [449—394]

* * * * *

A. Why, no, I am not mistaken.

Q. Was that the only reason that you refused them access to the public records? A. Absolutely all.

Q. When was that refusal made?

A. I do not recall. You probably have the date there, haven't you?

Q. Was it not made during the time that you were examining their books and preparing exhibits A, B and C?

A. I should answer no, but I do not remember what the time was because I remember that when I made the objection to their seeing the records—

Q. (Intg.) What is that?

A. When I made the objection to their seeing the custom-house records it was on the very ground that they did not permit us to have all of their records, and if they wanted ours they would have to get them the same way we would have to get theirs.

Q. Did the Western Fuel Company furnish you with any papers after the first indictment was found?

Mr. ROCHE.—You mean recently?

Mr. McCUTCHEON.—No. What I am trying to develop is this, that the examination was continuous, that it began before the indictment was found and that it continued after the indictment was found without any interruption.

Q. Is not that true, Mr. Tidwell?

A. I am unable to answer that positively; I am in-

(Testimony of W. H. Tidwell.)

clined to think that they did. That is my best belief.

Q. Now, while you were continuing your investigation which began before the first indictment and continued for a long period after the finding of that indictment, is it not a fact that it [450—395] was during that time that these defendants sought the privilege of examining the public records of the United States and that you prevented them?

A. I can not state as to the time.

Q. You cannot state as to the time? A. No.

Q. But you do say that it was because they refused to let you have access to their records?

A. Yes, sir.

Q. And you are unable to state any record for which you called and which you did not get?

A. Up to a certain period.

Q. Up to the time that you prevented them having access to the public records?

A. When I prevented them having access to the public records was after they had declined to give us certain records that we asked for.

Q. What record did they decline to give you and which served as a basis for your instruction not to permit them to examine the public records?

A. They were various records which have since been produced.

Q. You knew that the records which they wanted to examine were the public records of the United States, did you not?

A. Well, now, that is a question.

Q. You have used them as public records, have you

(Testimony of W. H. Tidwell.)

not, in the preparation of these papers?

A. Yes, sir.

Q. You have had access to them all the time, have you not? A. Yes, sir, I have.

Q. And any other citizen of the United States could have had access to them by asking for them, could he not? A. Well, it appears not.

Q. Why does it appear not?

A. It appears that somebody declined to give you permission to [451—396] see them.

Q. You did that, did you not?

A. Yes, I did that.

Q. In your experience have you ever known or have you ever heard of that having been done before?

A. Not that I can recall.

* * * * *

Mr. McCUTCHEON.—Q. I have asked this question two or three times before, but I have not had an answer to it which is satisfactory to me, so I will ask it just once more: Will you name any paper, book, record or voucher of the Western Fuel Company for which you had asked and which had not been furnished you at the time you prevented the defendants from having access to the records of the United States in the preparation of their defense?

* * * * *

A. There was no specific paper or record which was asked for. The general records which were asked for under the subpoena were desired at that time, and because they were not delivered but were withheld I asked—I don't recall whether it was the former col-

(Testimony of W. H. Tidwell.)

lector or the present collector, to refuse to permit any one connected with the Western Fuel Company to see the records of the custom-house during that period.

Q. To what subpoena do you refer?

A. I don't know the date of it. There were various subpoenas, several subpoenas.

* * * * *

I don't know whether my request that the defendants should be denied access to the records herein referred to occurred before or after the appointment of Messrs. Sullivan and Roche [452—397] as special prosecutors in this case. I can not recall when said request was made at all. I do know that I made that request to one of the collectors; just which one I don't know. I did that in the interest of justice. I remember being present at the interview of Mr. Olney with Surveyor McKinlay. I do not recall that I said at that time that I did not think these defendants should have access to the public records, because they had not furnished me with their records. I do not recall the conversation that I then had with Mr. Olney. I remember being present, and that I met Mr. Olney in the hall, and he told me he was going to the office of the surveyor for the purpose of getting some records, and I went with him and the matter was discussed with Surveyor McKinlay. I do not recall whether or not I at that time assigned the failure of the Western Fuel Company to furnish me with records as the reason why I requested the surveyor not to give the Western Fuel Company certain records from the custom-house.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—Q. Now, I ask you, Mr. Tidwell, to tell us anything you said on that occasion.

A. I don't remember anything special. If Mr. Olney will kindly refresh my mind on that subject I will be very glad to testify to it.

Mr. OLNEY.—I can do that with perfect ease if you want it right now.

The WITNESS.—I would be very glad to have it right now; I would just as soon testify to it now as at any other time.

Mr. OLNEY.—I met you in the hall, as you say, and went into the surveyor's office with you and told the surveyor what I wanted. You were there. And the surveyor said that that [453—398] was chiefly in your hands and in the hands of Mr. McNab, who was then the district attorney; we had some talk about it, and you said you thought the matter had better be referred to Mr. McNab, and you would take it up with him. That was the substance of the conversation.

Mr. McCUTCHEON.—Q. Do you remember that?

A. I do not.

Q. Your mind is a complete blank on that subject, is it?

A. Yes,—no, I would not say it is a complete blank because I remember the occurrence but I do not remember the conversation.

* * * * *

Q. You said that you had about half a dozen men working on the books of the Western Fuel Company, did you? A. Well, I had at least that many.

(Testimony of W. H. Tidwell.)

Q. And they continued for you say about two months?

A. Well, I would not say that all of them continued for two months, but there were 3 or 4 men who continued all of that time. There were others that I used at various times.

Q. What was the largest number of men you had employed on the books and records of the company at any one time?

A. I should say 6 or 8; I don't recall just exactly.

Q. When were Exhibits "A, B and C" offered as part of your testimony actually completed?

A. As to that I cannot say exactly, but it was about two months after work was begun on them. I did a great deal of this work. I did most of it except the actual clerical work.

* * * * *

Q. In the preparation of Exhibit "A" what papers and books did you use?

A. I used the vouchers of the Western Fuel Company. I used the custom-house entries; some of the custom-house records; also occasionally a dock book. I [454—399] think that is all.

Q. You say you used the custom-house entries and custom-house records; how do you distinguish between custom-house entries and custom-house records?

A. I refer to a record as a book which was kept in one document. The entries are here in evidence.

Q. When you say a book, do you mean those large books that are now in the room of the Circuit Court of Appeals?

(Testimony of W. H. Tidwell.)

A. No, sir. I think they were referred to occasionally though.

Q. They were used in the preparation of these statements, were they not?

A. I think they were referred to occasionally, but I don't remember any specific instance in which they were used.

Q. Is not the information contained in Exhibit "A" also contained in those custom-house books to which you have referred?

A. Why, yes, I should say it should be.

Q. Those are the books access to which Mr. Olney desired?

A. Well, he asked for the records. I suppose he meant those.

Q. You knew he referred to those at the time, did you not? A. Yes, I think so.

Q. And those are the records you refused him to have access to?

A. Yes. I will add, however, that those records have been at your disposal for the past week or 10 days.

That is to say, you waited until this trial actually began before you gave us access to those records?

A. They were produced as soon as you asked for them.

Q. What do you mean by that?

A. I was informed that you wanted to see the records and I had them sent up here to this building.

Q. That was after this trial began.

A. Yes. [455—400]

Q. At all times before the trial began, when the

(Testimony of W. H. Tidwell.)

defendants requested the privilege of examining those records you denied them that privilege, did you not? A. I only recall Mr. Olney being there once.

Q. You never sent word to Mr. Olney that you had changed your mind about it, did you?

A. I don't recall the conversation which Mr. Olney says took place.

Mr. ROCHE.—These books, Mr. McCutchen, were produced here by us at your request simply because you wanted them brought out here. There were no subpoenas issued for them. There is no question about that, is there?

Mr. McCUTCHEN.—Oh, I understand, Mr. Roche, that you very kindly produced the books when we said we wanted them. Of course, there is no question but that we could have demanded the production of the books, and they could have been produced here. While you extended the courtesy to us of having the books brought out here, Mr. Roche, I do not think the Government is entitled to any very great credit for that because we could have had them produced here.

Mr. ROCHE.—I understand that, Mr. McCutchen, but you do not intend to insinuate, do you, that you did not have access to these records before they were brought out here?

Mr. McCUTCHEN.—Those are the very books to which we did desire access and which this witness prevented us having access to.

Mr. ROCHE.—But that was months ago.

* * * * *

Mr. McCUTCHEN.—Q. You do not recall that

(Testimony of W. H. Tidwell.)

you ever sent word to Mr. Olney that you changed your conclusion or your determination with reference to his right to examine those books, do you? [456—401]

A. As I said a few moments ago, I do not recall, Mr. McCutchen, that any promise was ever made to Mr. Olney.

Q. I am not asking you about any promise; I am asking you now if you are not absolutely certain you never sent word to Mr. Olney that his request to examine those books would be granted.

A. I never sent him any request.

Q. I don't say request; I say you never sent him any word that his request would be granted?

A. No, I never sent him any word.

Q. After you had that conversation with Mr. Olney, did you file or make any protest with or to any Government officer with reference to Mr. Olney's right to examine the books?

A. I do not recall at the time whether it was before or after the conversation which Mr. Olney says that we had, as to whether I made the request before that time, or after.

* * * * *

The WITNESS.—A certain matter has come to my mind by which I can establish when I made the request of the collector of customs not to permit the defendants to see those records.

Mr. McCUTCHEN.—Q. What is the date?

A. I cannot tell you here, but I can tell you from my office records.

(Testimony of W. H. Tidwell.)

Q. What is the circumstance?

A. It was a dispute with Collector Stratton.

Q. And you have a record of that?

A. Yes; I can establish it by that date—the date.

Mr. ROCHE.—Q. Will you get that date during the noon recess for us? A. Yes, I will. [457—402]

I know from my examination of the custom-house records that a record is made of every cargo of imported coal that comes into this port of San Francisco. After the cargo has been discharged a note is made in a book which shows whether there is an overage or a shortage. That is done within a reasonable time after the discharge. The first ship that discharged in February, 1911, was the "Puritan." There was a shortage in that case. While I could not say positively how soon that shortage would be entered in our books, it certainly would be known within a month. The custom-house records were referred to when necessary in the preparation of my Exhibit "A," and such records should, as I have just said, show within a month after the discharge of the "Puritan" what her shortage was; and that is so not only with reference to every shortage, but, as to the out-turn weight of every cargo, whether there would be a shortage or an overage.

Q. You have taken every case in which there was a shortage for the purpose of preparing your Exhibit "A" as evidence of a fraudulent entry on the part of the Western Fuel Company, have you not?

* * * * *

(Testimony of W. H. Tidwell.)

A. It has so been stated in making a claim on the entire shortage; but we have not only taken the shortages on Exhibit "A," but we have taken all coal received by the Western Fuel Company, which includes overages as well as shortages.

Mr. McCUTCHEN.—Q. In the preparation of Exhibit "A" have you not taken every shortage as a fraudulent entry? A. Yes, sir.

Q. Now, turn to that particular ship that you spoke of a moment [458—403] ago as having been discharged in 1911, what was the name of it?

A. In February, 1911?

Q. Yes. A. The "Puritan."

Q. Where did she discharge, if you know?

A. I don't know.

Q. And you say there was a shortage in that case?

A. Of 22 tons, 241 lbs.

Q. And for the purpose of reaching your aggregate you have treated that shortage as a fraudulent one, have you not? A. Yes, sir.

Q. Do you know anything about the facts with reference to that entry? A. I do not.

Q. What was the next case of shortage?

A. The next case of shortage was the "Strathblane."

Q. What was the amount of shortage in that case?

A. 30 tons, 784 lbs.

Q. For the purpose of arriving at your aggregate of 20,700 odd tons, you have treated that as fraudulent, have you not? A. I have.

Q. Now, when you have come to an overage, have

(Testimony of W. H. Tidwell.)

you also treated that as fraudulent?

A. I have not.

Q. Why not? A. For the reason that the company paid duty on that amount.

Q. How do you know that the company paid duty on enough even in that case?

A. I don't know, but it is the best I could get from the records.

Q. You do, however, in every case where there is a shortage, if I may repeat it, treat that shortage as a fraudulent shortage? A. Yes, sir.

Q. And that applies to every case in your Exhibit "A" where there [459—404] was a shortage?

A. Yes, sir.

Q. By the way, in your examination of these records of the custom-house, did you go so far as to investigate other importations of coal, or importations of coal by other importers than the Western Fuel Company?

A. Do you refer to those which were sold to the Western Fuel Company?

Q. No, I refer to all importations of coal after we will say, April, 1906, and which are recorded in those custom-house books to which you have referred.

A. I have made no special investigation of any other company excepting the Western Fuel Company.

Q. You say you have not made any special investigation? A. Yes.

Q. But did you not, in the course of the investi-

(Testimony of W. H. Tidwell.)

gation which you did make, examine the records of the custom-house, or some of them, with reference to importations of coal by importers other than the Western Fuel Company?

A. No, I did not, but I examined the records and entrys of other importers who had sold to the Western Fuel Company.

Q. But you made no examination, as you have said, with reference to importations of other coal importers who did not sell to the Western Fuel Company.

A. No, I had none of those under consideration at all.

Q. And you had not the curiosity to examine the records of the custom-house to see what the experience was with reference to those importations?

A. I had not those under investigation at all.

Q. Well, I say you had not the curiosity to learn what the experience was in cases of that kind?

A. Well, I had not considered it at all. [460—
405]

* * * * *

Mr. McCUTCHEN.—Q. Now, you say that this record of yours indicates the place of discharge of coal under some circumstances; that is true, is it?

A. Yes, sir.

Q. Under what circumstances does it indicate the places discharged?

A. Well, I don't know that I fully grasp your question.

Q. You say that in some cases you have the initial

(Testimony of W. H. Tidwell.)

"O," and in other cases, you have the word "Eureka," or the initial "E," and in other cases the initials "S. D."

A. I can explain that to you. For instance, if a cargo is discharged at San Diego, while it is taken up on the records of the books of the Western Fuel Company at San Francisco as a receipt by the company, but not at San Francisco, and as a sale of the San Francisco office, the entry of the merchandise is actually made at the port of San Diego.

Q. By the Western Fuel Company?

A. No, sir, by the party to whom the coal was sold; in the case of San Diego, it was to the Spreckels Commercial Company, I think.

Q. That is to say, in the San Diego case, the entries were not made by the Western Fuel Company.

A. No, sir, they were not.

Q. And yet, you have charged the Western Fuel Company, here, with having made those entries, and you have charged that those entries were fraudulent, have you not?

* * * * *

A. Yes, sir. The Western Fuel Company would take up the amount on its own books as coal received at San Francisco, and also take it up as coal [461—406] received at San Francisco, and so it was treated as a San Francisco transaction, except as to the entry and the discharge of the coal.

Mr. McCUTCHEON.—Q. Is that the only explanation you have for having charged the Western Fuel Company with having made a fraudulent entry in

(Testimony of W. H. Tidwell.)

each of those San Diego cases? A. Yes, sir.

Q. That is the only evidence you have; and you consider that that warranted you in making the charge against the Western Fuel Company that it had fraudulently entered each one of those cargoes?

A. Yes, sir.

Q. Do you know what any one of those cargoes weighed?

A. I do not, other than what the record shows.

Q. You have no information on it whatever?

A. Other than what the record shows.

Q. And yet, in each one of those cases you have solemnly charged these defendants with having made fraudulent entries of those cargoes.

A. No, sir, I have not charged the defendants with making fraudulent entries, because they do not make the entry.

Q. Why, then, did you include those shortages in your total of 20,700 tons?

A. For the reason that the Western Fuel Company swears before the American Consul that there is that much coal on that ship, and it is not natural to suppose that the company is going to send its ship to a foreign port with less coal than she can carry—the invoice weight.

Q. And it is on that assumption you base the charge that the Western Fuel Company defrauded the Government of revenue on those San Diego discharges? A. Yes, sir. [462—407]

Q. You have said you also examined the books of

(Testimony of W. H. Tidwell.)

the Western Fuel Company to determine the sales it has made?

A. I have examined not the books, but their sales sheet.

Q. Now, I understand you to say that it is your understanding—and I assume that it was your understanding when you prepared Exhibit "A"—that in no one of the San Diego cases did the Western Fuel Company have anything to do with the discharge of the cargo.

A. That is my understanding.

Q. That is your understanding, is it?

A. Yes, sir.

Q. And it was your understanding when you prepared Exhibit "A"? A. Yes, sir.

Q. And you knew, when you included those shortages in your total of 20,700 tons, that the Western Fuel Company had nothing to do with the discharge of any part of that tonnage at San Diego?

A. No, I could not say that they had nothing to do with the discharge; I know that the entry was made in the name of other other parties who purchased the coal.

Q. You presented that exhibit here, did you not, for the purpose of sustaining the claim that the Western Fuel Company had short-weighted the Government? A. Yes, sir.

Q. And you knowingly included those San Diego discharges in your Exhibit "A" for the purpose of sustaining that shortage, did you not? A. I did.

Q. Now, will you turn to your record; I have in-

(Testimony of W. H. Tidwell.)

dicated here the page of your Exhibit "A" from which these cargoes are taken; turn to page 1 of your exhibit, here.

The "Reider," discharged at San Diego, shows an invoice [463—408] weight of 5810 tons, and the custom-house weight, 5668 tons, 770 pounds, a shortage of 141 tons, 1470 pounds. The "Titania," on page 3 of Exhibit "A," likewise discharged at San Diego, shows an invoice weight of 5650 tons, and a custom-house weight of 5563 tons, 2010 pounds, giving a shortage of 86 tons, 230 pounds.

Q. Turn to page 6, to the "Tordenskjold."

A. All right.

Q. What is her invoice weight? A. 5907.

Q. What was her custom-house weight?

A. 5622 tons, 2090 pounds.

Q. What was the shortage, if any?

A. 284 tons, 150 pounds.

Q. Turn to page 8.

Mr. ROCHE.—What was the last one?

A. 284—150.

Mr. McCUTCHEON.—That was one of your samples, Mr. Roche, by the way, when you were exploiting these percentages to the jury.

Q. Turn to page 8, the "Titania."

A. The "Titania."

Q. What was her invoice weight. A. 5621.

Q. And her custom-house weight?

A. 5392 tons, 2140 pounds.

Q. And the shortage?

A. 248 tons, 100 pounds.

(Testimony of W. H. Tidwell.)

Q. Now, turn to page 11, to the "Tordenskjold"; what was her invoice weight?

A. 5963—wait a minute.

Q. I am afraid you will say my eyes are bad again.

A. That is San Diego.

Q. I have said San Diego seventeen times. I want you to confine [464—409] yourself to San Diego.

A. There are two "Tordenskjold" at San Diego on this page.

Q. Take the first one, then.

A. The first one is wrong. The second one is the one we want. "Tordenskjold," 5706 tons.

Q. That is the invoice weight of it? A. Yes.

Q. What is the out-turn weight or custom-house weight? A. 5690 tons, 40 pounds.

Q. And the shortage?

A. 15 tons, 2200 pounds.

Q. Now, take the case of the "Bessie Dollar." This is another one of your exploitations, Mr. Roche.

A. What page is that?

Q. Page 14. A. 6825.

Q. And the custom-house weight?

A. 6446—1428.

Q. And the shortage? A. 378—812.

Q. The "Tordenskjold," page 19, what is the invoice weight of that? A. 5752.

Q. And the custom-house weight?

A. 5586—959.

Q. And the shortage, if any? A. 165—1281.

Q. Now, the "Titania," page 20. A. 5929.

(Testimony of W. H. Tidwell.)

Q. And the custom-house weight?

A. 5861—410.

Q. And the shortage, if any? A. 67—1830.

Q. Now, the "Thor," page 22.

A. 7425; 7376—1630 pounds; shortage, 48—610.

Q. The "Thor," page 24.

A. Invoice, 7277; out-turn, 7207—180; short, 69—2060.

Q. The "Thor" again, page 26. You find, by the way, do you not, that each of those is a San Diego discharge?

A. Yes. There is 7318 invoice; ascertained, 7216, I believe it is, 1210 pounds; short 101 tons, 1030.

Q. Page 32, the "Thor"?"

A. 7234 invoice weight; 7166—49 ascertained weight; shortage, 67—2191 [465—410]

Q. Page 37, the "Thor"?

A. 7198 invoice; 7151—950 ascertained; 46 tons, 1290 pounds short.

Q. Page 37½ of the "Thor"?

A. Is that also San Diego?

Q. That is San Diego.

A. The record does not show whether that is San Diego or not.

Q. It is San Diego, in fact.

A. It is. 7244. 7206—1960; short 37—280.

Q. Is it 27 or 37? A. 37—280.

Q. Now, according to this chart, Mr. Tidwell, the aggregate of the invoice weights of those cargoes is 90,896 tons, and the aggregate of the custom-house weights is 89,177 tons, 146 pounds, making a differ-

(Testimony of W. H. Tidwell.)

ence of 1738 tons, 2094 pounds. Of course, in view of Mr. Roche's suggestion, I won't commit you to the correctness of the additions.

A. That is accepted subject to correction.

* * * * *

Q. Your exhibit "A" was prepared on the theory, was it not, that in each of these cases, delineated upon this chart these defendants had knowingly and willfully short-weighted the Government on those cargoes.

* * * * *

A. Yes.

Q. Now, you have told us that you also examined the sales-books of the Western Fuel Company, have you not? A. The sales sheets.

Q. Didn't you say that you had examined the sales of the company?

A. I said the sales sheets which are in evidence.

Q. Well, you have said that these cargoes were actually discharged [466—411] by J. D. Spreckels and Brothers, haven't you?

A. I think all of the entries are in their names.

Q. All of the entries are in their names. Do you know on what weights they paid for the coal?

A. I should say they paid on the out-turn weights.

Q. You should say they did. Didn't you know that to be the fact?

A. No, I have not seen the records of the Western Fuel Company.

Q. Didn't you state on your examination in chief that you had examined the sales records of the West-

(Testimony of W. H. Tidwell.)

ern Fuel Company? A. I did not.

Q. Then you say that it is your impression, and was your impression at the time you prepared Exhibit "A" that that coal had been paid for by J. D. Spreckels & Brothers on the out-turn weight?

A. That is my understanding of it.

Q. And yet you charge these defendants with having fraudulently swindled the Government out of the duty on that 1738 tons? A. I did.

Q. Notwithstanding the fact that the company, the Western Fuel Company, was only paid for 89,157 tons?

A. That may be a fact, and it may not be. I am not able to say.

Q. But you say you assumed that at the time you made this statement. Have you any other explanation for having included those cargoes in this list of so-called fraudulent discharges? A. None.

Q. None, whatever? A. No.

Q. You considered that you were justified in making that charge upon that information alone?

A. I do.

* * * * *

[467—412]

Q. This 1738 tons is included in your total of 20,700, of the duty on which you say these defendants swindled the United States Government, is it not?

* * * * *

A. Yes.

Q. Then you knew at the time you included them in that 20,700 tons that this defendant, that the West-

(Testimony of W. H. Tidwell.)

ern Fuel Company and none of these defendants had had anything in the world to do with the discharge of any one of these cargoes?

A. No, I did not know that.

Q. Did you know that they had? A. I did not.

Q. You have got as much information on that subject now as you ever had? A. Yes.

Q. And, without having had any information at any time upon that subject, you charged these defendants with having swindled the Government out of the duties on that 1738 tons? A. Yes.

Q. Did you ever go to San Diego in the course of your investigation? A. I did not.

Q. Did you send anybody there? A. I did not.

Q. How did you learn that these discharges had been effected by J. D. Spreckels & Bros. and not by the Western Fuel Company?

A. I sent down for the entries.

Q. You sent for the entries. Did you do that before you prepared Exhibit "A"?

A. I did it while it was in preparation.

Q. While "Exhibit A" was in preparation you learned that the Western Fuel Company had absolutely nothing to do with the discharge of any one of these cargoes? [468—413]

A. I have not so testified.

Q. Read the question. (Last question repeated by the reporter.)

A. I don't know whether they did or not.

Q. You say you know as much on the subject now as you ever knew. That is a fact, isn't it?

A. Yes.

(Testimony of W. H. Tidwell.)

Q. And you don't know now that the company had anything to do with the discharge of any one of those cargoes? A. I do not.

Q. Then you did not know that at the time that "Exhibit A" was prepared by you?

A. I did not.

Q. But, nevertheless, you included those in Exhibit "A" upon the theory that the Western Fuel Company had fraudulently cheated the Government out of the duty on that coal? A. Yes.

* * * * *

Mr. McCUTCHEON.—Q. Mr. Tidwell, in your Exhibit "A" you have a total of coal received, have you not? Will you give us that total?

A. For the entire period of that exhibit?

Q. Yes.

Mr. ROCHE.—You mean the out-turn weight or the invoice weight?

Mr. McCUTCHEON.—I am coming to that.

A. The total amount received, according to the Western Fuel Company's records is 2,138,831 tons, 472 pounds.

Q. That is what? Is that the invoice weight?

A. You have asked for the amount received—the ascertained weight.

Q. That is the ascertained weight? A. Yes.

Q. What did that coal weigh?

Mr. ROCHE.—You mean its actual weight?

[469—414]

Q. Yes?

A. I don't know that I can answer the question.

(Testimony of W. H. Tidwell.)

Q. Why can't you answer it?

A. Because I did not weigh it.

Q. Therefore, you don't know what its weight was?

A. No.

Q. You can't throw any light, then, on that subject to the jury? A. Oh, yes, I can.

Q. What can you throw beyond what you have already thrown?

A. The invoice weight shows it to be 2,159,551 tons, 1147 pounds.

Q. Were those invoice weights correct? Did they represent the exact weight of the coal at the time it arrived here?

A. From the discoveries made yesterday, it was probably incorrect.

Q. In the case where that was not the case, do the invoice weights represent the exact weight of the coal at the time it arrived here?

A. So far as we know, yes.

Q. How far do you know?

A. As far as the invoice shows?

Q. That is as far as you do know? A. Yes.

Q. That is all you know on the subject?

A. Yes.

Q. Whether those invoice weights were correct, or not, you don't know? A. No.

Q. Whether the ascertained weights were correct, you don't know? A. We claim they were not.

* * * * *

Q. You stated that the weights with which Mr. Mills charged his barges were the ascertained weights? A. Yes.

(Testimony of W. H. Tidwell.)

Q. And you went into quite an elaborate calculation to show that there had not been as much coal delivered to steamers as Mr. Mill's barge weights indicated, did you not? [470—415]

A. Yes.

Q. For the purpose of determining the quantity of coal out of the duty on which the Government was defrauded, you treated the ascertained weights as the actual weights, did you not? You treated the bill of lading weights as the actual weights, didn't you?

A. I do not quite get that.

Q. For the purpose of ascertaining the quantity of coal out of duty on which the Government had been defrauded, you treated the bill of lading weights as the actual weights, didn't you? A. Yes.

Q. Did you treat the bill of lading weights as the actual weights when you came to make up the percentage of overage on barge deliveries?

A. I did not.

Q. Why not?

A. Because Mr. Mills' books would show that only a certain amount of tonnage had gone into the barge. It did not show an entire cargo going into the barge.

Q. Is that the only reason? A. Yes.

Q. Now, let us see if I understand you. The only reason that you took the ascertained weight for the purpose of determining the overage on the barges was that only parts of cargoes went into the barges, is that true? A. That is true.

Q. Didn't you state repeatedly during your examination in chief that the weights with which the

(Testimony of W. H. Tidwell.)

barges were charged were the ascertained weights?

A. Yes, they were the ascertained weights. I still state it.

Q. They were the ascertained weights?

A. Yes, so shown by the records of the Western Fuel Company.

Q. And in no case was the barge charged with the bill of lading weights; is that true?

A. Not to my knowledge.

Q. Well, then, if you say that the ascertained weights did not [471—416] represent the correct weight, so far as the importations are concerned, why do you say that the ascertained weights represent correct weights when you come to determine overages on barges?

A. We are not treating them as whole cargoes on the barges, we are simply treating with partial cargoes, and as far as Mr. Mills' books would show, coal would go into the barges.

* * * * *

Q. Now, then, for the purpose of determining the quantity of coal out of the duty on which the Government was defrauded, you took the bill of lading weights as the actual weights of the cargoes, didn't you? A. Yes, I did.

Q. And you took the custom-house weights as incorrect weights of the cargoes, didn't you?

A. In some instances.

Q. In nearly every instance?

A. No, for the reason that there were many partial cargoes—let me get that question. I did not quite get it.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—In your question, Mr. McCutchen, you included partial cargoes, which represent a considerable quantity of this coal.

(The last question repeated by the reporter.)

A. There were many partial cargoes on which the invoice weight of the coal was not shown at all.

Mr. McCUTCHEN.—Q. Can you give us any impression of how the aggregate weight of partial cargoes compares with the aggregate weight of entire cargoes in your Exhibit "A"?

A. It is in evidence, here, but I cannot give you the amount.

Q. It is almost infinitesimal, isn't it?

A. I would say so.

Q. Is it one per cent, according to your impression? [472—417]

A. I don't recall what the figures are. To the best of my memory it is about, I would say about 25 per cent.

Q. That is to say, partial cargoes represent about 25 per cent?

A. I am estimating that. It can be found out from one of the exhibits. I don't recall what the exhibit shows.

Q. Then, in all other cases, you have treated the invoice weights as incorrect weights, haven't you?

A. Yes.

Q. That is to say, for the purpose of determining the quantity of coal out of the duty on which the Western Fuel Company defrauded the Government?

A. Yes.

(Testimony of W. H. Tidwell.)

Q. For the purpose of determining overages on barge deliveries, what weight did you take as the correct weight?

A. I could only take the weight which was shown by Mr. Mills' books had been loaded into the barge.

Q. You stated on your direct examination that those were custom-house weights, didn't you?

A. Yes, I so understand, except where they remove coal from the yard and place it on the barges.

Q. That is to say, for the purpose of showing that these defendants were guilty of a fraud on importations, you treated the custom-house weights as incorrect weights? A. Yes.

Q. And for the purpose of showing that the Western Fuel Company had been a party to defrauding the Government in the collection of drawbacks you treated the custom-house as correct weights, did you not?

* * * * *

A. Yes, for the reason that they were the only weights that we had to show the amount of coal which went into a barge. When the question of payment of drawback arose, drawback was paid on the out-turn weights. To illustrate, if the barge would show 1000 [473—418] tons was received on board, the duty would only be paid on 1000 tons; if the out-turn weight was 1200 tons, the drawback would be paid on 1200 tons.

* * * * *

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—Q. I won't apologize for this question, because your Honor has heretofore appointed me percentage man on our side of the case. I am going to ask the witness if he will tell the jury what is the percentage of shortage on these San Diego deliveries.

Mr. ROCHE.—You mean for him to make the calculation, do you?

Mr. McCUTCHEON.—Yes, I would like to have him make the calculation and tell the jury the percentage of shortage on those deliveries.

A. It is a little bit less than 2 per cent.

Q. It is higher, is it not, than your percentage obtained by grouping all the cargoes that were short, as shown in your Exhibit "A"?

A. You mean the total of all received and the total of all—the total invoice weight and the total out-turn weight?

Q. Yes. A. Yes, sir.

Q. You gave a percentage derived by taking all of the short cargoes set forth in your Exhibit "A," did you not?

A. Well, there was a statement to that effect which, as I recollect now was about 1.84.

Q. This percentage is higher than that, is it not?

[474—419]

A. I have not figured it down to the exact percentage, but it is about that.

Q. Have you not figured it far enough to know that it was higher than that percentage?

A. I will do it if you wish me to.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Mr. McCutchen, did you say that the witness presented a table?

Mr. McCUTCHEN.—I did not say that he presented a table, but I said that the witness answered a question put to him by you as to what was the percentage of shortage on short cargoes only as set forth in his Exhibit "A"? A. This would be 1.92.

Q. In other words, it is higher than your statement heretofore made of the percentage of shortage on all the short cargoes set forth in your Exhibit "A"?

A. Yes, sir.

Q. Just before the Court went into recess you were being examined with reference to weights with which the barges were charged? A. Yes, sir.

Q. If those barges had been charged with the invoice weights which you now say were the correct weights instead of the custom-house weights, what, if anything, would have been the overage?

Mr. ROCHE.—I object to the question, if your Honor please upon the ground that the witness has not said that the invoice weights were the correct weights.

Mr. McCUTCHEN.—He has said that he has taken them as the correct weights for the purpose of determining and arriving at the 20,700 odd tons out of the duty on which he says these defendants defrauded the Government.

Mr. ROCHE.—That, of course, is correct, if your Honor please, but that is not the question which counsel has asked. [475—420]

Mr. McCUTCHEN.—Let us have the question read.

(Testimony of W. H. Tidwell.)

(The question was here read by the Reporter.)

Mr. ROCHE.—You are assuming that the weights are correct?

Mr. McCUTCHEN.—No, I am not assuming that the weights are correct.

The COURT.—Well, let the witness answer the question.

A. I am unable to say.

Mr. McCUTCHEN.—Q. Why?

A. For the reason that total cargoes did not go into the barges.

Q. Supposing the barges had been charged with invoice weights in cases where the total cargoes went into the offshore bunkers, from which bunkers the barge coal was drawn, instead of the custom-house weights, would the overage to which you have testified have been smaller or greater?

Mr. ROCHE.—I object to the question because thus far it has not appeared in the testimony that any single cargo or any whole cargo was ever entirely delivered to any offshore bunker or to any of the pockets of the offshore bunker.

Mr. McCUTCHEN.—It does seem to me that that is a peculiar objection for counsel to make, may it please your Honor. This witness has said in response to a question—

The COURT.—Mr. McCutchen, I am prepared to overrule the objection the moment I get a chance to rule. The objection is overruled.

Mr. McCUTCHEN.—Very well, your Honor, I am sorry that I anticipated your Honor.

(Testimony of W. H. Tidwell.)

A. The overage of an entire cargo if an invoice weight had been taken up on a barge would have been smaller.

Q. The overage would have been smaller?

A. Yes, sir. [476—421]

Q. Then, for the purpose of making the overage as large as possible, you have said, when it came to determining the shortage on importations, that the invoice weight was the correct weight, but that when it came to determining the overage on barges you have said that the custom-house weight was the correct weight, have you not?

A. Yes, and they are both correct.

Q. Will you explain to us how that is?

A. When a vessel is being discharged considerable coal goes into the bunkers which does not go over the scales, according to information, and consequently the coal incoming weighs short. When it is laden into the barge every lb. of it which goes into the barge or through the offshore bunkers is actually weighed; and in addition to that the coal is being discharged over the inshore bunkers, where the coal drops into the inshore bunkers, but is never discharged, so far as I am informed, over the offshore bunkers when that coal can drop into the offshore bunkers; consequently every lb. of coal that goes into the offshore bunkers is actually weighed.

Q. Does not that reason simply accentuate the difference instead of explaining it? Does it not occur to you that it does?

A. I don't catch the full meaning of your question.

(Testimony of W. H. Tidwell.)

Q. You don't catch the full meaning of it?

A. No, sir.

Q. In other words, you say the coal which went into the bunkers actually weighed more than the custom-house weights?

Mr. ROCHE.—In what bunkers?

Mr. McCUTCHEON.—I don't care,—in all the bunkers?

A. There is a difference in the bunkers.

Q. Very well, we will withdraw that question. Do you say that [477—422] the coal which went into the offshore bunkers did not weigh any more than the custom-house weight? A. Yes.

Q. You say that it did not? A. It did not.

Q. It weighed exactly the custom-house weights?

A. And on which the company paid duty.

Q. How do you know that, Mr. Tidwell?

A. From the records which have been introduced in evidence.

Q. What records?

A. The records of the Western Fuel Company.

Q. Tell us what records you refer to particularly.

A. I was referring to the yellow sheet of the discharge of the ship which is signed, I believe, by Mr. Mills, and which Mr. Hahn testified to.

Q. That was one sheet, was it? A. Yes, sir.

Q. And do you make that statement on the strength of the showing of that one sheet?

A. There are others; that is the only one that has been placed in evidence.

Q. That is the only one that has been placed in evi-

(Testimony of W. H. Tidwell.)

dence. Now, you do say that notwithstanding the fact that your claim is that the invoice weights were the correct weights on importations the custom-house weights were the correct weights on deliveries to barges? A. Yes, sir.

Q. And your explanation for that is the one you have just made? A. Yes, sir.

Q. Do I understand your testimony to be that in your opinion all of the coal which went into the offshore bunkers was honestly weighed?

A. Yes, sir.

Q. And that the coal dishonestly or fraudulently weighed went into the other bunkers? [478—423]

A. Went into the inshore bunkers.

Q. Now then, having said, as I understand you, that the weights charged against the barges were the correct weights, will you explain to the jury again how you arrived at that total overage?

A. The difference between the amount which was credited to the barge, or debited to the barge, and the amount which was removed from the barges or laden on to the vessels.

Q. Oh, no. I say your total overage. You have said that we had an overage of something like 61,000 tons. Will you explain again how you got at that?

A. Yes. It is the difference between the amount of coal received as shown by the company's records and the amount that was sold.

Q. Did you not, in answer to a question put to you by Mr. Roche, attempt to specify the items that went to make up the whole 61,000 tons?

(Testimony of W. H. Tidwell.)

A. I only specified that up to about 43,000 tons.

Q. And where did you get the 43,000 tons?

A. Overrun on the barges.

Q. The 43,000 tons was overrun on the barges?

A. It was 33,000 tons from January, 1906, to November, 1912, and about 10,000 tons in 1904 and 1905; that is my remembrance of the figures.

Q. Let us confine ourselves for a moment to the period between April, 1906, and the 31st of December, 1912. Just explain to the jury the detail of your method of arriving at the total overage during that period.

A. I accepted the amount which had been received according to the records of the Western Fuel Company and subtracted that from the amount of sales by the Western Fuel Company during that same period of time. [479—424]

Q. That is to say, you mean you subtracted the custom-house weights from the sales? A. Yes, sir.

Q. Do I misunderstand you then in thinking that you did give the detail of those figures?

A. I don't recall giving the detail. I remember reading from Exhibit "C" certain items there which made up 33,000 tons, and again from the additional Exhibit "C" which made up about 10,000 tons. I also recall Mr. Roche asking me the difference between the two, which was something like 28,000 tons.

Q. The difference between what?

A. The difference between 33,000 and 61,000.

Q. You say that the total overage on the barges was 43,000, do you not?

(Testimony of W. H. Tidwell.)

A. In January, 1904, it was—

Q. (Intg.) Oh, I understand; that goes back to a later period. A. Yes.

Q. How did you say that you arrived at the total overage, if I may ask you the question again?

A. By deducting the amount of coal received by the Western Fuel Company from the amount sold.

Q. That is to say, you deducted from the amount sold—

A. (Intg.) And the amount on hand and the amount burned, I should have added.

Q. You deducted from the amount sold and on hand and burned the custom-house weights?

A. Yes, sir.

Q. Now, supposing you had deducted the invoice weights would that have made any difference?

A. It would have made a larger overage.

Q. It would have made a larger overage?

A. Yes, sir.

Q. Now figure that out for us, Mr. Tidwell. Where is your [480—425] Exhibit "A"?

A. I think it is here somewhere. I want Exhibit "A" and Exhibit "B" also.

Q. I think it is all set forth at the end of your Exhibit "A," is it not?

A. No, sir. I am mistaken about that, it would have been a smaller overage.

Q. Well, what would it be?

A. 41,276 tons.

Q. Now, is not that the overage according to your statements heretofore made?

A. I never mentioned the figures before.

(Testimony of W. H. Tidwell.)

Q. You have stated that the invoice weights were the correct weights of the coal received here, have you not? A. That is our claim.

Q. If that be true, then the overage is only 41,000 tons instead of 61,000 tons; is not that true?

A. Yes, but they did not pay duty on the difference between those two amounts.

Q. Well, we will come to that later on.

A. But I want to answer that now, they did not pay duty on the difference between the invoice weights and the ascertained weights.

Q. What has that to do with the quantity of coal which was actually received, and which must be used to determine the overage?

A. As to that I cannot answer.

Q. As a mathematician can you not tell that? Let me put that question to you in another way. You have stated before the jury a number of times, have you not, that the Western Fuel Company had sold 61,000 more tons than it actually paid duty [481—426] on, or received?

A. No, sir; I did not say actually more than it had paid duty on; I said actually more than it had received, according to its records.

Q. What do you mean by according to its records?

A. The records of the Western Fuel Company.

Q. Now, if the invoice weights were correct, that excess was only 41,000 tons, was it not?

A. Evidently.

Q. And you say that the invoice weights were correct? A. That is our claim.

(Testimony of W. H. Tidwell.)

Q. Now, will you tell us what the percentage of that overrun is, or shortage? A. To what?

Q. To the total amount which you said was sold?

Mr. ROCHE.—Do you concede that the invoices were correct?

Mr. STANLEY MOORE.—We are examining the witness, Mr. Roche; you ought not to interrupt.

Mr. McCUTCHEN.—How long have you had this witness on the stand, Mr. Roche?

A. I don't think you meant just exactly what you said, Mr. McCutchen.

Q. Possibly not; suppose you answer it just as you think I meant it and if your answer does not satisfy me I will put another question.

A. I cannot answer it as you ask it.

Q. What percentage does that overage ascertained in the way that I have suggested to you bear to the total sales? What percentage does that difference of 41,000 and odd tons bear to the total sales of coal of the company during that period?

A. It is about 2 per cent, I think.

Q. What is the total on which you figured it? What is the total [482—427] of the invoice weights?

A. I did not figure on the invoice weights; you said sales weight.

Q. Figure it now on the invoice weight. What is the total of the invoice weight? A. 2,138,831.

Q. What is the percentage? What is the total invoice weight—will you state it again?

(Testimony of W. H. Tidwell.)

A. I have just given it to you, 2,138,831.

Q. Now, see what that percentage is.

Mr. STANLEY MOORE.—That, Mr. Tidwell, is the bill of lading weight that you are giving us. He is asking you to figure it on the invoice weight.

A. That is what I am figuring it on.

Q. What do you say the invoice weight is?

A. 2,138,831.

Q. We have it here as 2,159,551.

A. That is the invoice weight.

Q. That is what he is asking you.

A. I misunderstood you then. It is approximately 1.8 per cent.

Mr. McCUTCHEON.—Q. 1.8 per cent?

A. Either 1.8 or 1.9; it is just between; it is just a difference between 1.8 and 1.9.

Q. Then, according to your theory the Western Fuel Company sold only 1.8 per cent more coal than it actually received?

A. Yes, according to this statement here.

Q. Well, according to your statement.

A. According to our theory; but in many instances in the discharge from the barges it would amount to 2 or 3 per cent; I think in some instances as much as 20 per cent. This is a general average. [483—428]

Q. I understand you to say, Mr. Tidwell, that in your opinion the coal that went into the offshore bunkers was correctly weighed? A. Yes, sir.

Q. That is to say, you mean the coal which went into the offshore bunkers and the Folsom Street bunk-

(Testimony of W. H. Tidwell.)

ers, and which were weighed at the Folsom Street scales and to which reference has been made here—

Mr. ROCHE.—Just a moment, Mr. McCutchen. We object to that question, if your Honor please, as calling for the conclusion of the witness. We haven't any objection to counsel asking the witness whether it is upon that theory that this calculation was made, but the opinion of the witness one way or the other of course cuts no figure in this litigation.

The COURT.—That is quite true. You can ask him if these calculations were made upon that basis, but to ask him what he thinks about the matter, what he thinks about the matter is no more binding upon the jury than my opinion would be or your opinion would be.

Mr. McCUTCHEN.—Q. Your calculation was made on that basis, was it not? A. Yes, sir.

Q. That the coal which passed over the scales and went into the offshore bunkers was correctly weighed? A. Yes, sir.

Q. Does not that assumption include all coal that passed over the scales?

A. Why, not in every instance, no.

Q. Well, aside from these three or four instances that have been spoken of here does not that assumption include every ton and every pound of coal that passed over the scales?

A. No, sir; for the reason that we have some information as [484—429] to crooked weighing.

Q. Mr. Roche has called your attention to the discharge of several cargoes, where there was a short-

(Testimony of W. H. Tidwell.)

age; you have those in mind, have you not?

A. Yes, I have those in mind.

Q. The "Dumbarton" and the "Germanicus"?

A. Yes, as well as other matters.

Q. Where the settlement was made with the Government on the invoice weight, and not on the custom-house weight? A. That as well as other matters.

Q. Now I ask you, what other matters have you in mind and which you use in that assumption other than these three instances of the "Germanicus" and the "Dumbarton"?

Mr. ROCHE.—That is objected to, may it please your Honor, upon the ground that it is not proper cross-examination.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

I did not prepare Table C necessarily on the assumption that all of the coal that went into the offshore bunkers went into the Folsom Street offshore bunkers. I simply treated the bunkers as bunkers according to the record. I do not recall whether it said Folsom Street bunkers or Mission Street bunkers. I could not say for sure now, because I do not recall whether I could tell in any case where coal was charged as having gone into an offshore bunker, whether the reference was to Folsom Street bunkers, or the Mission Street bunkers, or the Howard Street bunkers, or the Green Street bunkers, or the Vallejo Street bunkers. I do not know the situation with reference to any of those bunkers, [485—430] except the Folsom Street bunkers. I am not familiar with the docks other than Folsom Street, so I could

(Testimony of W. H. Tidwell.)

not say whether the Government weigher at all the wharves at which coal was discharged could see the entire operation. I never made any investigation to determine what the conditions were at the docks other than Folsom Street. I do not know what proportion of coal was discharged at other docks than Folsom Street, and for aught I know more than half the coal may have been discharged at other docks, though my information is that the greater part of it was discharged at Folsom Street.

Q. When you first arrived at the overage in this case what was it, in your opinion?

The COURT.—You mean in amount.

Mr. McCUTCHEON.—In amount, yes, your Honor.

A. About 58,000 and some odd tons, I don't recall the exact amount.

Q. Do you remember a conversation with Mr. Norcross in which you told Mr. Norcross that his overage was too great and that the overage was not more than 39,000 tons? A. No, sir.

Q. Did you ever have any conversation with Mr. Norcross on that subject? A. I did.

Q. When and where did you have that conversation? A. In my office.

Q. What did you tell him in that conversation?

Mr. ROCHE.—I object to the question upon the ground that it is not proper cross-examination, and if put for the purpose of impeachment, the precise statement made by the witness to Norcross must be set forth, together with the time, place, circumstances and parties present. [486—431]

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—We are not asking it for that purpose now. We may want to fix those circumstances a little more definitely later on. But it seems to me that this is cross-examination. If the witness now says that the overage is 61,000 tons, and he said at a previous time that it was only 39,000 tons, it seems to me that we have the right to develop that upon his cross-examination.

A. I did not say it was 39,000 tons.

Mr. McCUTCHEON.—I say, if you did.

The COURT.—The objection is overruled.

Mr. McCUTCHEON.—Q. What did you say it was?

A. About 58,000.

Q. When did you have that conversation with Mr. Norcross? A. The date I do not remember.

Q. Did you ever say to Mr. Norcross that the overage was not more than 39,000 tons? A. No.

Q. Did you ever put it below 59,000 tons?

A. Yes.

Q. Or below 58,000 tons? A. No, sir.

Q. After having had your first conversation with Mr. Norcross with reference to overage, did you at a subsequent conversation with him state that the overage was 50,000 tons and that you had raised your figures from 39,000 to 50,000? A. I did not.

Q. You have stated that your first figures were 58,000 tons? A. Approximately.

Q. Approximately 58,000, and that you never thought the overage was less than 58,000, or approximately 58,000?

* * * * *

A. No, sir. The amounts 58,000 to 61,000 was

(Testimony of W. H. Tidwell.)

raised on account of certain [487—432] comparisons and checking off certain errors between Mr. Norcross and myself; I found some errors in the figures he had given me, and there were some amounts added to and stricken off of the report, which then showed an overage of 61,000.

Mr. McCUTCHEON.—Q. Is it not a fact that when you first arrived at a figure which you thought represented the overage, that that figure was in the neighborhood of 39,000 tons? A. No, sir.

Q. Is it not a fact that after subsequent investigation you concluded that the overage was greater, but that it did not exceed approximately 50,000 tons, and you so stated to Mr. Norcross?

A. 58,000 is my remembrance of it, approximately 58,000.

Q. Will you state positively now that you did not tell Mr. Norcross that the overage did not exceed 50,000 tons? A. Yes, sir.

My title with the Government service is Special Agent of the Treasury Department. The duties of that position are generally the checking of the records of the custom-house, looking after the administration of customs, the values of goods, as well as the question of all frauds on the Government so far as customs are concerned. I began my investigation in this particular case in August or September, 1912.

Q. At or about that time, or at any time subsequent to that date, did you make any arrangement with any of the newspapers by which you were to

(Testimony of W. H. Tidwell.)

supply them with information which you might acquire in the course of your investigation?

A. I did not.

Q. At or about the time that these indictments were returned, [488—433] or at any time from the time when you began your investigations, did you make any arrangement by which you were to supply information to any of the newspapers with reference to the facts of this case? A. I did not.

Q. Did you ever have any conversation with the representative of any newspaper in San Francisco with reference to supplying or furnishing to that newspaper information regarding the facts of this case? A. I did not.

Q. You did not have any arrangement or understanding of that nature or character?

A. None whatever.

Mr. ROCHE.—Q. Either directly or indirectly?

A. Either directly or indirectly. And I would like to have you produce the witnesses to that effect.

Mr. McCUTCHEON.—Q. While you were making this investigation and while you had access to the books and records of the Western Fuel Company, did you supply information obtained by you in that confidential relation to the newspapers of San Francisco? A. I did not.

Q. To any newspaper? A. No, sir.

Q. When you say that you did not supply information of that nature to any newspaper, do you wish to be understood as saying that you did not supply it to any person who was to convey it to a news-

(Testimony of W. H. Tidwell.)

paper, or to any newspaper? A. I do.

Q. And when you say that you did not supply any such information to any newspaper, do you mean to be understood as saying that you did not supply it directly or indirectly to any newspaper?

A. I mean to be understood that I had absolutely nothing to do with the supplying of information to any newspaper, either directly, indirectly or otherwise. [489—434]

Q. And that you never had any understanding that you would supply information which came to you during this investigation?

A. I think my last answer answers that.

* * * * *

Mr. McCUTCHEON.—Q. Did you not furnish to some person to be by him furnished and supplied to one of the newspapers in San Francisco a copy of a report made by the United States Attorney for this district to the Attorney General at Washington concerning this case? A. No, sir.

Q. Oh, by the way, will you produce one of those San Diego entries, please. You have them all here, have you not?

A. If you will state which one you would like to see I can get it for you.

Q. Any one of them.

Mr. ROCHE.—What particular number do you want?

Mr. McCUTCHEON.—Look at page 1 of your Exhibit "A," take the "Reidar," for instance.

The WITNESS.—That would be during the

(Testimony of W. H. Tidwell.)

month of May. May, 1906. You won't find those San Diego entries for that particular date, they were burned up to 1909, they were destroyed; I think it was 1909.

Mr. NORCROSS.—Look for the San Diego entry No. 225.

Mr. ROCHE.—Suppose you take it for 1910.

Mr. McCUTCHEON.—I have it here.

Q. I call your attention to the entry of the cargo of the steamship "Thor," the invoice being dated the 7th of January, 1910, and ask you if you will state when the entry was made. You are more familiar with that than I am.

A. The entry seems to have been sworn to on January 17, 1910, and the deposit of the duty was made on the same date. [490—435]

Q. Was there afterwards the return of any duty on that transaction? A. Yes, 31.46. .

Q. To whom was that returned?

A. Evidently to the importers of the coal.

Q. That is, to J. D. Spreckels & Brothers?

A. The Spreckels Brothers Commercial Company.

Q. It was not returned to the Western Fuel Company, was it? A. No, sir.

Mr. McCUTCHEON.—I suppose it will be admitted, Mr. Roche, that this is a sample of all of the entries made on that San Diego coal.

Mr. ROCHE.—Subject to correction, yes. I assume that to be correct.

Mr. McCUTCHEON.—The amount of duty deposited was larger than when the duty was finally ascer-

(Testimony of W. H. Tidwell.)

tained and there was a rebate paid.

Mr. ROCHE.—But there was no drawback—

Mr. McCUTCHEON.—No.

Mr. ROCHE.—I will assume that that is correct. Subject to correction, I will assume now that it is correct.

Mr. McCUTCHEON.—Q. Mr. Tidwell, will you give me the date of a cargo that was discharged in 1907 on which there was a shortage? I want to get the corresponding entry in this record,—say, between August 1st, 1907, and March 31, 1908.

A. Here is one in August, the steamer "Tellus."

Q. What date in August is that?

A. I cannot tell you the date without referring to the entry.

Q. I have the entry of the "Tellus" here. It is entered here on August 5th. Will you look at this record which is indorsed, "Weigher's record, Surveyor's Office, Custom House, August 1, [491—436] 1907, to March 31, 1908"; look at the entry of the "Tellus" under date of August 5th. Here it is on this tabulation in the month of July; it is under the month of July in your Table A. (Addressing Mr. Roche.) I don't care to offer this book in evidence, Mr. Roche, or to offer all of these books; I want to offer this record as a sample of the entries that were made in the custom-house book.

Mr. ROCHE.—Very well, you don't have to offer the book.

Mr. McCUTCHEON.—Q. Will you read that, please, Mr. Tidwell?

(Testimony of W. H. Tidwell.)

A. Do you want the numbers and everything?

Q. Yes, or I think perhaps I can read it. I think we will be able to abbreviate this, with the consent of counsel. Let me read it and you can watch me while I am reading it so as to see that I read it correctly. I think that counsel will agree to this. In a column, at the head of which is "Number" are the figures "11,942." Under the column for the date is 5th, August being at the head of the column. I understand that to mean the 5th of August. Under the name of the vessel is the word "Tellus." Under the column headed "From whence arrived" is the name "Ladysmith." Under the column "To whom consigned as per permit" are the words "Western Fuel Company." In the column at the head of which are the words "Packages, contents and quality" is "3630 tons of coal." Then in brackets immediately following the word "Coal" is the following: "Short 88, 2080 2240ths tons," which means 88 tons, 2080 lbs. Is that correct?

A. Yes, sir.

Q. This is a sample of the entry which you said this morning was made upon the discharge of each cargo, and within a month at least of the time when the cargo was discharged? [492—437]

A. It should be made within that time; that would be a representative entry of all of them.

Q. Now, the fact is, is it not, that these records are kept from day to day, and instead of this being made within a month it is made from day to day?

A. Yes, but I know when it was made, but I understand that it should be made that way.

(Testimony of W. H. Tidwell.)

Q. I understand your answer, Mr. Tidwell, because you don't know about this particular entry; that is what you mean, is it? A. Yes, sir.

Mr. McCUTCHEON.—I will show this to the jury. This is the number of the entry; this is the date; this is the name of the ship; this is the place from which the cargo came; this is the consignee; this is the number of tons in the cargo; and in brackets is the shortage in that particular cargo.

Q. Now, Mr. Tidwell, that is the sort of a record that was made in the custom-house every time a short cargo arrived here?

A. A short or over or otherwise.

Q. We are dealing now with short cargoes. That is the sort of an entry that was made every time a short cargo arrived?

A. Yes, that was the usual entry.

Q. Well, that was the invariable entry, was it not? Not the usual entry, but it was the invariable entry, was it not? A. Yes, I should say that it was.

BE IT REMEMBERED that thereupon the following testimony was given and the following proceedings were had:

Mr. STANLEY MOORE.—If your Honor please, we would like to ask the witness just a few questions in order to lay a definite record in regard to a certain matter as to which he has been [493—438] questioned.

Q. Mr. Tidwell, do you recollect upon what date it was that the company turned over the books to

(Testimony of W. H. Tidwell.)

yourself and to your assistant back in February of this year?

A. No, I do not recall the exact date, but I do recall, or at least I think I am correct in this as to the exact date, that the company was subpoenaed to appear before the Grand Jury to produce its records on the 7th of February. That is my best remembrance of the date at the present time, and that soon after that, a few days afterwards, the records were turned over, that is, certain records were turned over.

Q. Had any demand been made upon the company previous to the service of this subpoena?

A. No, sir.

Q. Do you remember whether after the subpoena was served upon the company, and within a day or so, Mr. Norcross or Mr. Olney or Mr. Howard informed you, or the members of the Grand Jury, or the United States District Attorney, that you were welcome to look at the books?

Mr. ROCHE.—That question is objected to as not proper cross-examination.

Mr. STANLEY MOORE.—It goes to fix a date, your Honor. There has been some suggestion here in regard to the books during the direct examination, and the suggestion it seems to me has been thrown out by the witness during the cross-examination that there was nothing voluntary about the original production of these books. In view of that I simply wanted to develop the fact so that the witness could judge as to the correctness of that statement. It goes to fix the date with reference to this other mat-

(Testimony of W. H. Tidwell.)

ter that I desire to lay the foundation for. [494—
439]

Mr. ROCHE.—Counsel can by a direct question put to the witness, bring out that matter. He can put a direct question to the witness for the purpose of ascertaining or having him fix the precise date upon which the particular transaction which he has in mind occurred; but he has no right for that purpose to attempt to elicit from the witness conversations which took place between himself and various other parties. The only purpose for which this examination was permitted this morning, or for which it was pursued, was for the purpose of showing animus, or rather, it was so claimed because the witness at a certain time made a certain request of one of the Government officials with reference to certain Government documents. That matter was fully developed this morning and was fully investigated as the result of the questions put to the witness. This should not be permitted now under the guise of cross-examination.

Mr. STANLEY MOORE.—I think I would have the right to go into the question of the original production of the books at any event in view of some of the assertions and statements made by the witness during the course of his examination, and by Mr. Roche as well during the course of the objections, which objections have been interlarded with statements as to the facts concerning these matters. I simply wanted to develop the fact from the witness in regard to the production of the books. And inci-

(Testimony of W. H. Tidwell.)

dentially, I want to also fix a certain date with respect to the appearance of certain newspaper articles.

The COURT.—The objection is overruled.

Q. The date which I will fix is February 7th—and I think that is correct, on that date Mr. Norcross and the defendant Howard appeared in answer to a subpoena and brought two or three records; one was a book kept by the defendant Mills; [495—440] another was a discharge sheet—those yellow discharge sheets, and another was a large book which is also in evidence here, I don't know how to describe it exactly. At that time both Mr. Howard and Mr. Norcross, as I remember it, stated that we could have their books to go into whenever we saw proper. A few days later, probably the next day, I don't know exactly, Mr. Norcross and I had a conversation and certain records were then delivered.

Mr. STANLEY MOORE.—Q. Well, is it not a fact that they also stated to you at that time that you could go down there, together with any persons whom you might designate to assist you in the examination, and examine the books and records of the company, down in the office of the Western Fuel Company?

Mr. ROCHE.—That is objected to, if your Honor please, upon the same grounds.

The COURT.—That does not fix any date.

Mr. STANLEY MOORE.—Q. Well, do you recall anything further having been said in that connection, Mr. Tidwell, other than what you have already testified to?

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—That is objected to upon the same grounds.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Q. Then I will ask you this question, Mr. Tidwell: How soon after February 7th, if it was February 7th, did you go down to the offices of the Western Fuel Company for the purpose of making an examination there of its books and papers?

Mr. ROCHE.—The same objection, and upon the further ground that the witness has been already interrogated in relation to this subject matter.

The COURT.—The objection is overruled. [496
—441]

A. I think it was only two or three days; it might possibly have been the next day. I don't recall the exact time. Within a day or two I will say.

Mr. STANLEY MOORE.—Q. It was within a day or two of February 7th, if that was the date?

A. Yes, I should say so.

Q. Or on February 6th, if that was the date. Now, Mr. Tidwell, I want to ask you this further question: Do you recall any newspaper articles appearing with respect to this matter until after you had secured access to the books and papers of the Western Fuel Company?

Mr. ROCHE.—That is objected to upon the ground that it is not proper cross-examination; and upon the further ground that counsel is now endeavoring to inject into this record matters—

The COURT.—The objection is sustained.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—If your Honor please, I wish it for the purpose of laying a record for subsequent testimony. That is all.

Q. Then, Mr. Tidwell, do you recall an article appearing in the "San Francisco Bulletin" the day after you commenced this examination of the books and papers of the Western Fuel Company concerning these books and papers?

Mr. ROCHE.—The same objection.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Q. I will ask you this further question: Do you recall, Mr. Tidwell, a further article appearing in the "San Francisco Bulletin" on the day after that, and to the effect that the books of the company— [497
—442]

Mr. ROCHE.—(Intg.) Just one minute. I object, may it please your Honor, in view of your Honor's ruling, to counsel pursuing this line of examination or putting these questions to the witness as counsel knows that the witness will not be permitted to testify.

Mr. STANLEY MOORE.—Your Honor, this is the point that is in our minds; this witness has stated that directly or indirectly he never entered into any arrangement with any newspaper looking toward publicity with respect to this matter, or gave out any articles or newspaper items concerning the same; now, that is a statement that we want no mistake in this record concerning, and—

The COURT.—There is no mistake about it, he

(Testimony of W. H. Tidwell.)

was quite positive about it.

Mr. STANLEY MOORE.—Yes, your Honor, and we want it so he will have to continue to remain quite positive about it; in other words, we want to make the record full and specific in that regard, and that is all.

The COURT.—It is quite full enough.

The WITNESS.—I will here repeat the same answer, if that is satisfactory.

Redirect Examination by Mr. ROCHE.

Upon the first occasion to which I referred during my cross-examination, and when certain books, papers and documents of the Western Fuel Company were turned over to me, I did not receive all of such books, papers and documents as had bearing upon this inquiry. It was sometime prior to June 24th, 1913, that the Western Fuel Company refused to give me permission to examine any book, paper or document in its possession relating [498—443] to the subject matter of this controversy. That date, June 24th, 1913, I have fixed as the date when I objected to the collector of customs permitting the Western Fuel Company to look at certain records in the custom-house. I am satisfied that it was before this date that the Western Fuel Company had declined and refused to permit me or any other Government official to examine any one of those papers, documents, vouchers or books in its possession, or under its control. So that my request that the Western Fuel Company be denied access to these custom-house records was made subsequent to the Western Fuel

(Testimony of W. H. Tidwell.)

Company's refusal to give me their documents, subsequent to the date I have given, and prior to the date of the trial of this case, the Government officials or some of the Government attorneys attempted to obtain possession of some of the books, papers and documents in the possession of the Western Fuel Company, which in their opinion related to the matters here being investigated. A subpoena was served upon the officers of the Western Fuel Company in this connection, on August 11th, if I am not mistaken, and another about August 14th. I think there were three such subpoenas in all requiring the Western Fuel Company to produce certain records, papers and documents and vouchers before the Federal Grand Jury. The Western Fuel Company refused to comply with the demand.

I testified in response to questions put to me by counsel for the defendants that there were about 41,000 tons of excess coal or excess tonnage of coal sold by the Western Fuel Company between April, 1906, and December 31, 1912, if, instead of taking into consideration the coal received as disclosed by the records of the Western Fuel Company, I were to take into consideration the invoice weights of the cargoes of the imported coal. That, of course, took into consideration likewise the partial cargoes concerning which I have heretofore testified. The 41,000 tons of excess coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, was excess tonnage based upon and taking into consideration overage and invoice weights of imported coal.

(Testimony of W. H. Tidwell.)

I also testified that this excess of coal sold by the Western Fuel Company based upon the invoice weights should be about 1.8 per cent; [499—444] that calculation being based upon the assumption that the invoice weight would represent the true weight of coal imported into the harbor, and not the ascertained weight, or the weight upon which the Western Fuel Company paid duty to the Government. If it be true that the invoice weights represent in fact the true and actual weights of the cargoes of imported coal brought into the State of California by the Western Fuel Company, it would then necessarily follow that the Western Fuel Company failed to pay the United States Government duty upon the coal representing the difference between the invoice weight and the ascertained weight.

Q. In answer to a question put to you by Mr. McCutchen just before Court adjourned, and to which your attention was again directed after Court convened this afternoon, you did say that the shortages were based upon the difference between the invoice weights and the ascertained weights, and the overages—so far as the barges were concerned—were based upon out-turn weights,—that is, from the off-shore bunker, which represents ascertained weights and discharged weights.

A. The difference between the entered weight and the discharged weight.

Q. Is there any inconsistency in that calculation?

A. I don't think so.

Q. You say that there is no inconsistency in that

(Testimony of W. H. Tidwell.)

position. Will you explain why?

A. For the reason that the coal in-coming is given an invoice weight at the mines, and after it arrives here a considerable quantity of the coal is alleged to have been placed in the bunkers without ever being weighed, consequently that would cause a shortage in weight over the invoiced weight; whereas the coal which actually goes over the scales and is then transferred in [500—445] cars which have been weighed to the offshore bunkers and then goes into the barges, every pound of which coal is accurately weighed; the coal going out of the barges into the vessels in nearly all instances showed an overage.

Q. During the examination which you made of the books and records and papers of the Western Fuel Company, did you at any time ascertain that any coal had been deposited or dumped into the offshore bunker, or into any of the pockets of the offshore bunker, which had not gone over the scales, and which had not been weighed?

Mr. McCUTCHEON.—We object to that, if your Honor please, as calling for hearsay evidence.

Mr. ROCHE.—I am asking him for his knowledge, based upon the records which are in evidence.

Mr. McCUTCHEON.—You mean from the records, do you, Mr. Roche?

Mr. ROCHE.—Yes, certainly.

Mr. McCUTCHEON.—Then I withdraw the objection.

A. The records would indicate in every instance that coal had been weighed; it was even shown to the

(Testimony of W. H. Tidwell.)

pound. In some instances I think it is down as low as 40 pounds; so many tons 40 pounds, as being the weight of the coal going into a barge. In every instance, it would show the exact amount.

Mr. ROCHE.—That is, the exact weight of coal checked into the barge?

A. Yes, sir, even to the pound.

The daily discharge record or records heretofore introduced in evidence are, according to my understanding, samples of the daily discharge records kept by the Western Fuel Company, [501—446] some of which were examined by me. It is true that each one of those daily discharge records, or at least each one of those which I examined, disclosed the exact place where the coal unloaded from the steamship was distributed; and so far as the offshore bunkers were concerned, these daily records or charts disclose the quantity of coal deposited into that offshore bunker, and into its pockets, after said coal had come off the scales and at the ascertained weight, and it is upon that ascertained weight that the duties are paid to the United States Government. I do not think that it would be possible from the records kept by the Western Fuel Company or any of its officers to determine what proportion of the invoice weight ought to be checked up against the offshore bunker or any of its pockets, or against any of the barges, for the simple reason that in distributing the coal throughout the various compartments, bunkers, yards, etc., no consideration is taken of the invoice weight at all, but only of the amount of coal which is

(Testimony of W. H. Tidwell.)
weighed out of the ship.

Recross-examination by Mr. McCUTCHEON.

I have just stated on redirect examination that the coal that came into the offshore pockets was accurately weighed. The coal which went into the inshore bunker was not, so far as my knowledge goes, weighed in any different manner, in so far as it was weighed at all, from the coal that went into the offshore bunker. That is to say, my understanding is that the coal which went into the offshore bunker was weighed on the same scales as the coal which went into the inshore bunker. I have said that the coal which went into the offshore bunker was correctly weighed. The scale was not manipulated in [502—447] reference to that coal, so far as I know. The coal destined for the inshore bunker, which actually went on the scales, was weighed in the same manner as that which was destined for the offshore bunkers. My information is, and I have so stated on redirect examination, that every pound of coal that went into the offshore bunker was accurately weighed.

Q. Now, is it not also the fact that every pound of coal which was weighed was accurately weighed?

* * * * *

A. I am only testifying in so far as the record is concerned. I have no personal knowledge of the weighing of the coal.

Mr. McCUTCHEON.—Q. Then do we understand that all you know about it is what you found in these records?

A. Yes. I have been told some other things, but

(Testimony of W. H. Tidwell.)

I don't suppose you want that.

The COURT.—Well, the question is, that that is all that you have been testifying to?

A. Yes, that is all I have been testifying to, to the records, right straight through.

Mr. McCUTCHEON.—Q. In making up your exhibits, you acted, then, on the assumption, did you, that all of the coal which was weighed and which went into the offshore pockets, was accurately weighed? A. I did.

Q. In making up your exhibits, did you also act upon the assumption that all coal which went into the inshore bunkers and which was actually weighed, was accurately weighed? A. I did.

Q. In making up these exhibits, then, you did so upon the assumption that the weighing operation in each and every instance, [503—448] whether the coal was discharged into the offshore bunkers or into the inshore bunkers, was honestly conducted?

A. I accepted each weight as it appeared.

In answer to the question put to me by counsel for the Government, I gave the percentage of overages on the barge deliveries. Among those percentages was one of 70 per cent, which I afterward reduced to 21 per cent. The figure 70 per cent was incorrect, in so far as Mr. Mills' books were concerned. My statement was correct; Mr. Mills' books were incorrect in that particular instance. Whether Mr. Mills' books were incorrect in every other case where I gave a percentage, I could not answer. I should say that the total out-turn was incorrect. I did not check up

(Testimony of W. H. Tidwell.)

the other percentages which I have given by going back over the records and checking up from the first time a ton of coal was placed in a barge up to the very end, as I did yesterday. There is no other way of getting at the percentage of overage except as shown by the record and by Mr. Mills. I assumed that the figures of Mr. Mills in the books were correct, and I acted accordingly. In the case of the 70 per cent overage I found that these figures were incorrect, and I made the correction. I did not check the figures up in the other cases to find whether they were correct or incorrect. The average was 519 tons in that instance, but it was on a larger amount laden into the barge than his second shows. It would be impossible between now and the next session of Court to go into all the figures and see whether the percentages I have given are correct, or not. It would likewise be almost impossible to go through the entire list and see whether my conclusion is correct in any one case. If you will point out any particular one I will be [504-449] very glad to check it up.

Further Redirect Examination by Mr. ROCHE.

I remember producing here at an earlier stage of this trial an enlargement of the books of the defendant Mills relating to the discharge of the steamship "Thor." That enlarged representation corresponded in every detail with the figures contained in the books of the defendant Mills.

Further Recross-examination by Mr. McCUTCHEON.

In arriving at my percentage of overage on the barges I did not take into consideration the times

(Testimony of W. H. Tidwell.)

when there was either an under-run or shortages. The shortages on barge deliveries were eliminated. No shortages are shown on Exhibit "C" at all. It represents the overrun of the barges by Mr. Mills. It does not purport to be a duplication of Mr. Mills' books. Where there was a shortage the Government lost nothing in drawbacks. The reason why I should not in a case, for instance where it appeared—to take a hypothetical question—that a barge ran 100 tons short and another ran 100 tons over, take into consideration the shortage of 100 tons for the purpose of determining the gross overage, is that the company in its claim for drawback would claim only whatever coal was laden on the ship. Wherever I have found an overage I have taken that as evidence that the company delivered more coal than was turned into the barges.

Q. And you don't think it is proper, for the purpose of determining the gross percentage, to take into consideration the total delivered to the barges, and the total delivered out of the barges? [505—450]

A. That, the Government has nothing to do with. We are not interested in anything of that character, for the reason that we only pay drawback on what is actually laden on the vessel, as shown by the records.

Q. Do you mean to say you can get the total overage in any other way than the way I have indicated?

A. That would be the only way to get the total overage, yes, sir; then our percentage, I should say, would be greater, because there were so few of the shortages,

(Testimony of W. H. Tidwell.)

that it would almost hardly be considered.

Q. What do you mean by saying the percentage would be greater; how could it possibly be greater?

A. For the reason that there would be more tonnage to handle.

Q. It would be a lesser percentage, would it not, instead of a greater one? A. No, sir.

Q. Is that the sort of arithmetic you have been giving us while you have been on the stand?

A. I think it is very good.

Q. You have not taken into consideration, for the purpose of determining the percentage, the overage on barge deliveries—

A. (Intg.) I have not considered the shortages at all.

Q. Now, I ask you if, as a man who is familiar with figures, as you say you are, you can determine the percentage of overage on barge deliveries, unless you charge the barge with every pound of coal received and credit it with every pound of coal delivered?

A. No, sir, you cannot.

Q. Then your method does not correctly show the percentage of overages, does it? A. It does.

Q. Let us assume, now, that we have ten barges, and that they are going to the offshore bunkers from day to day, getting coal, [506—451] and that they are then going to ships out in the offing from day to day delivering coal, is there any way known to arithmetic or science—I don't care what the science may be—by which you can determine the percentage of overages on such deliveries, unless you

(Testimony of W. H. Tidwell.)

put to one side all the coal that was delivered to the barges and to the other side all the coal that was delivered by the barges. Now, answer that question, will you, and then you can make any explanation you desire.

A. Yes, I will be very pleased to. An actual percentage, no. The Government is not interested at the present time in shortages; it is only interested in overages upon which it has paid money illegally.

Q. Suppose, Mr. Tidwell, by way of illustration, that the shortages were greater than the overages, would you still say that the percentage of overage was as great as you show in your statement?

A. No, sir.

Q. You would not? A. No, sir.

Q. Then the shortages have something to do with the determination of the overages?

A. It has nothing to do with this statement whatever.

The COURT.—I understand he is only dealing with such coal as was delivered to vessels where rebates have been claimed, and on vessels of the United States Government.

Mr. McCUTCHEON.—That is what we are talking about, your Honor. I suggest this, to your Honor—it probably would occur to your Honor, and I think it would occur to me; if I find shortage and overage in one case, and an overage in another, that there probably had not been correct weighing.

A. I think I have answered the question by saying that if you are trying to arrive at an exact percent-

(Testimony of W. H. Tidwell.)

age, then they should be [507—452] taken into consideration; but they have not been taken into consideration in this statement, because we were not concerned with them, and the percentage which is shown, of 6 per cent, refers only to overages, and not to shortages.

Q. Exactly, and that is not a correct showing of the gross overages, is it?

A. You mean a percentage of gross overages?

Q. Yes. A. No, sir.

Q. And not only is it not a correct showing of the percentage of overages, but it is not a correct showing of actual overage, is it, of the barge deliveries.

A. Yes, sir.

Q. Suppose there was no drawback involved here at all, Mr. Tidwell—

A. (Intg.) I will explain that. For instance, suppose a barge had 1,000 tons put on her and she checked out 995 tons, or 990 tons, the Government would only pay drawback on 990 tons, and not on 1,000 tons; the consequence is that the Government would have no interest at all in whether that checked short. On the other hand, if a barge takes on 1,000 tons and checks out 1,200 tons, the Government has evidently been defrauded out of the duty on 200 tons, and we have taken that into consideration in this particular statement.

Q. I will put the question to you again. Suppose that on one side it appeared that the barges had been charged with 10,000 tons of coal, and upon the other side it appeared that in the aggregate the barges had

(Testimony of W. H. Tidwell.)

delivered 10,000 tons of coal, but that when you came to deal with individual transactions, you found an overage in some cases and a shortage in other cases, do you mean to say that both the shortages and the overages should not be taken into consideration for the purpose of determining [508—453] whether the barges had delivered more coal than they had received?

A. We would only take into consideration the overages, in which the Government was concerned, and not the shortages.

Q. Well, then, if a given barge had received a given quantity of coal, and she had appeared to have delivered less coal to a drawback steamer than she had received, and still seemed to be empty, you would not take that into consideration in determining the percentage of overage, would you? Is that the method which you have pursued?

A. You mean the general percentage?

Q. Yes.

A. Yes, but I would not treat with the barge at all, just as I have not done here in this statement.

Q. Have you not treated with the barge in every case, here? A. Not one that was short.

Q. Not one that was short? A. No.

Q. Why?

A. Because we are not interested in it.

Q. Why, if one of these barges with which you have not treated, as you say, appears to have delivered to a steamer less coal than it received from the offshore bunker, but is still empty, why would you not take

(Testimony of W. H. Tidwell.)

that into consideration in determining the overage?

A. Because it would be very apparent there that the Government had not overpaid in drawback.

Q. Would it also be very apparent that a mistake had been made which should be rectified somewhere?

A. Yes, but the Government could not rectify it, because they only had made claim for a certain amount.

Q. But could not you have rectified it here in making this statement? [509—454]

A. We knew nothing about it until after we took possession of the books.

Q. Don't you think that a man who had possession of the books and who was inclined to make a fair showing as to the contents of the books for the purpose of informing the Court and jury what the overage had been, would have taken those shortages into consideration? A. No, sir.

Q. You don't think he would?

A. No, sir, for the reason that the man who obtained the coal makes his application. We have nothing to do with making the application, we pass on the applications after they are filed.

Q. I will put it to you in another way: We will assume that there were taken out of the offshore bunkers 10,000 tons of coal and that there were delivered from the barges 10,000 tons of coal; that the charges on one side balance the charges on the other, but we will assume that in some of these cases there was a shortage and in some of them there was an overage, but that the transactions, taken as a whole,

(Testimony of W. H. Tidwell.)

balanced one another. Have you proceeded on the theory that in such a case, if there happened to be an overage, you would charge it as a fraudulent overage, and if there happened to be a shortage, you would say that the Government had no interest in it?

A. Exactly.

Q. And you think that is an honest way of dealing with the transaction?

A. Yes, sir; because, as I said before, we have no interest in the shortages, whatever. We pay the amount of the claim, and nothing else. [510—455]

* * * * *

Mr. McCUTCHEON.—Q. Mr. Tidwell, will you turn to your "Exhibit C," using the books of Mr. Mills for this purpose if you desire, and let us know what you stated the percentage to be on the barge "Comanche" on her receipt and deliveries of coal beginning June 26, 1908, and ending July 20th of the same year—I mean ending September 5th of the same year?

Mr. ROCHE.—You understand, the table does not show when the barge commenced to take on coal.

Mr. McCUTCHEON.—The diary of Mr. Mills from which the table was prepared shows that.

Mr. ROCHE.—I understand this.

Mr. McCUTCHEON.—This is one of the cases in which the witness gave a percentage of overage.

Mr. ROCHE.—I simply want the record to show that the table to which the witness' attention is now being directed simply shows the date of clearance and

(Testimony of W. H. Tidwell.)

not the date upon which coal was first taken into or laden upon the barge.

Mr. McCUTCHEON.—I told him to use the record of Mr. Mills in connection with his Table C or use the record of Mr. Mills alone, if he desired.

Referring to the barge "Comanche," under date September 11th, the witness then continues:

Q. What did you state the percentage of overage to be on that transaction of delivery?

A. It appears to be about 10 per cent.

Q. It appears to be about 10 per cent. A. Yes.

Q. Well, now, will you state the figures on which you made the [511—456] statement it was approximately 10 per cent?

A. Received 1131 tons into the barge, an overage of 111 tons, without stating the lbs.

Q. Do you know whether that delivery represented all of the coal that went into the barge for the purpose of determining that overage?

A. Only as shown by the record of Mr. Mills' books.

Q. Could not you have ascertained exactly what went into the barge on that occasion or during those deliveries just as you did in the case of a larger percentage which you subsequently corrected?

A. Had every barge been checked from the time the first lb. went into her until it was discharged.

Q. Can you determine the percentage in any other way than that?

A. We accepted Mr. Mills' books as being correct and accepted the amount which was shown in those books as having been put into the barge.

(Testimony of W. H. Tidwell.)

Q. If you did not take the account or you did not take the entries in Mr. Mills' books for the purpose of showing all of the coal that was delivered to a barge, what do you mean by saying that you accepted Mr. Mills' books as correct?

A. Just exactly what I said.

Q. What is that? A. Just exactly what I said.

Q. If you did not take those things into account, you could not get a percentage, could you?

A. We did not figure up all of Mr. Mills' books to see whether he made any errors or not; we simply used his totals.

Q. I am not speaking of an error. Did you say there was an error in the case when you went into details yesterday and [512—457] arrived at a percentage? A. I did.

Q. What was the error?

A. In Mr. Mills not carrying forward, as he usually did, the total.

Q. Aren't there any number of cases where he did not carry forward the total?

A. That is the only one I know of.

Q. You have not examined any of these others?

A. No.

Q. Isn't it a fact that this is the only case, that is the one you detailed on the stand yesterday—is that the single, only case where you took off the figures showing the coal that went into the barge and the coal that went out of the barge for the purpose of determining the percentage?

A. You mean figuring it up?

(Testimony of W. H. Tidwell.)

Q. Yes.

A. Yes, except a few days ago when we were showing the discharge of the "Thor."

Q. That is to say, in only two cases?

A. There were two or three barges in that instance.

Q. In only two or three cases where coal was delivered to barges and discharged from barges did you attempt to determine the total deliveries to barges and the total deliveries from the barges?

A. No; I accepted the totals as shown by the books.

Q. You know that these totals don't show the detail deliveries, do you not?

A. Yes, they do not—wait a minute; they do not show the details—yes, they do show the detail deliveries.

Q. Then what do you mean by saying that you did not take the detail deliveries to the barges into consideration? [513—458]

A. Well, I referred then to the detail deliveries out of the barges. It also shows the detail deliveries into the barges for this case here, for instance—it shows that the barge "Comanche" received from the "Titania" 92 tons and odd lbs.; offshore bunker, 71 tons, 30 lbs.; offshore bunker, 131 tons, 240 lbs.; offshore bunker 114 tons, 2170 lbs.; offshore bunker 39 tons, 1860 lbs.; offshore bunker 39 tons, 1630 lbs.; from the "Torgenskjold" 662 tons, 930 lbs., or a total of 1131 tons, 412 lbs.

Q. A total of what? A. 1131 tons, 412 lbs.

Q. That is the total received upon which you derived this percentage? A. Yes.

(Testimony of W. H. Tidwell.)

Q. Well, now, isn't it a fact that the total received on that occasion was 3666 tons?

A. I know of no such figure.

Q. You don't know of any such figure? A. No.

Q. Will you attempt to say that was not the total received?

A. I could not answer it at all because I don't know.

Q. Then why have you undertaken to state percentages if you don't know anything about the figures?

A. I do know something about them. Mr. Mills' books show there was 1131 tons received into the barge.

Q. It shows there was 1131 tons received into the barge taking into consideration a balance that was on hand at a certain time, isn't that true?

A. There is no balance shown here at all.

Q. There is no balance shown there at all. Will you look at the record of Mr. Mills with reference to that transaction and see whether there is not a balance shown? [514—459] A. Yes.

Q. Before you answer that one: Do you draw a distinction between a case where a balance was carried forward and a case where there was a balance and that balance not carried forward?

A. I prefer to answer the other question first.

Q. Will you answer that question?

A. There is no balance shown here on the "Comanche" on December 11th.

Q. Now get the diary and the figures and see

(Testimony of W. H. Tidwell.)

whether according to the coal with which the barge was charged and the deliveries with which it was credited there was not in fact a balance on the barge at that time?

A. Well, it shows it had received 1131 tons, 412 lbs., and that it had discharged 1242 tons, 1991 lbs., an overage of 101 tons, 1579 lbs.

Mr. ROCHE.—Q. Is the overage specified in his handwriting? A. Yes.

Mr. McCUTCHEN.—Q. That is to say, the overage, but the percentage is not specified, is it?

A. Oh, no.

Q. You derived the percentage? A. Yes.

Q. Now, you are not prepared to say that the total deliveries to that barge for the purpose of determining that overage which you have just mentioned were not 3666 tons? A. I am not.

Q. You are not prepared to say that the total delivery for the purpose of determining that overage was not 3778 tons?

A. I am not. I simply accepted it as shown by the books.

Q. You would have no difficulty, would you, in going back to the original date on which that barge was loaded with coal [515—460] and following the loadings of coal on to the barge from that time until the overage was finally determined on?

A. I think not.

Q. You did not have any difficulty in doing that in the case where you went into the explanation, quite elaborately, yesterday? A. No.

(Testimony of W. H. Tidwell.)

Q. And that is the only way you know of by which you could determine an accurate percentage of overage; isn't it?

A. If you desire, Mr. McCutchen, we will be very glad to do that.

Q. Answer the question.

A. Read the question.

(Last question repeated by the Reporter.)

A. Yes, I think so; that should be the correct way. I would be very glad to do that for you if you would specify the cases.

Q. You made the statement that there was an overage of 22.6 per cent on the barge "Melrose," the deliveries to which began January 26, 1909, and the deliveries from which ended April 1, 1909?

A. That is the "Melrose," Mr. McCutchen.

Q. The "Melrose," yes?

A. Yes; the record of Mr. Mills shows that 881 tons, 459 lbs. had been laden on the barge, the coal being received from the steamship "Wellington," 191 tons, 149 lbs.; the "Titania," 107 tons, 1670 lbs.; the offshore bunker, 495 tons, 490 lbs.; offshore bunker, 87 tons, 410 lbs.; making a total, as before stated, and that she discharged into the steamship "China" 534 tons, 882 lbs.; the steamer "Manchuria" 546 tons, 1130 lbs., or a total of 1080 tons, 2014 lbs., or 199 tons, 1579 lbs. more [516—461] than had been laden into the vessel.

Q. Was there any coal on that barge on the—I withdraw that. What was the date on which you say the barge received those coals? A. I did not say.

(Testimony of W. H. Tidwell.)

Q. Do you mean to say that there was not any coal on the barge before the first of those deliveries was made to her? A. I do not.

Q. There might have been a great deal of coal on the barge at the time the first of those deliveries was made.

Mr. ROCHE.—Just a moment. That question is objected to, may it please the Court, upon the ground that it calls for the personal knowledge of the witness.

Mr. McCUTCHEON.—I will amend it by stating, according to Mr. Mills' records.

A. I would have to look at it.

Q. Do you mean to say that according to Mr. Mills' records there was no coal on the barge at that time?

A. I have not stated so.

Q. You have not. If you don't know that then your statement of a percentage is absolutely unreliable, isn't it?

A. No; the statement of percentage is based upon Mr. Mills' books.

Q. Haven't you just said that you don't know but that Mr. Mills' books show there was coal on the barge at that time?

A. I have not said any such thing, except on April 1st.

Q. Do you say there was no coal on the barge at the time the first of these deliveries was made according to Mr. Mills' books? A. I do not.

Mr. ROCHE.—Suppose you let him look at the books and [517—462] see if he can tell. These

(Testimony of W. H. Tidwell.)

statements were made a year and a half ago, or a year ago. You have the records in front of you, Mr. Tidwell.

Mr. McCUTCHEON.—Which statements do you mean were made a year ago?

Mr. ROCHE.—These statements were apparently made a year ago.

A. I did not trace the barges down anyway at that time, except—

Mr. McCUTCHEON.—Q. (Intg.) You were not concerned with tracing that down at that time when you were getting this percentage, were you?

A. As I said before, I accepted the totals of Mr. Mills' books as being correct.

Mr. ROCHE.—What was the date of the first delivery there, Mr. McCutchen?

Mr. McCUTCHEON.—January 26, 1909.

Mr. ROCHE.—Q. Will you look under date of January 26, 1909, and that may assist you in following it.

A. It is very difficult to follow those things without close application.

Mr. McCUTCHEON.—Q. You did not devote any very close application to these books for the purpose of determining any of these percentages?

A. I was not interested in percentages at that particular time; I was interested in the totals.

Q. You have just said, as I understood you, in order to determine these percentages, it requires very close application?

A. No, I didn't say any such thing.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—You will at least concede that the totals as shown by the witness' exhibit are the same as the totals [518—463] shown by Mr. Mills' books?

Mr. McCUTCHEN.—Oh, no, indeed we will not; that would be an admission of something that is not a fact.

A. On January 26 it shows offshore bunker account, for amount I believe it is—"Aust"—I presume that is Australia—14—1100, Melrose.

Q. What do you understand that to be?

A. I understand it to be 14 tons, 1100 lbs.

Q. Did you take that into consideration in determining the percentage of that overrun?

A. I took into consideration the totals as shown by the books.

Q. Did you take that delivery of 14 tons—

A. (Intg.) I never saw it—

Q. (Continuing.) —Into consideration in determining that percentage of overrun?

A. I never saw that particular entry before.

Q. Well, you didn't take it into consideration?

A. I don't know. It again shows on February 8th, the "Melrose" offshore bunker, 14—1100, which I understand to be tons and lbs.; the "Diamond Head" 992 tons, 400 lbs., a total of 1006 tons, 1500 lbs.

Q. Just a moment. You do not find any cleanup of that barge, do you, between the date of this delivery and the date on which you determined the overage? A. No, I have not seen any.

Q. Did you take these deliveries to the barge into

(Testimony of W. H. Tidwell.)

consideration in determining that percentage of overage? A. I could not tell you.

Q. Why are you in doubt about it?

A. Because I don't know; I never saw it before.

[519—464]

Q. Tell us now what figures you did take into consideration in determining the percentage of overage?

Mr. ROCHE.—That question is objected to, may it please the Court, upon the ground it has been asked and answered a half dozen times, the witness having testified that he took into consideration the totals as shown by the books and records kept by the defendant Mills which he assumes to be correct.

Mr. McCUTCHEON.—The witness has said that in one instance that he didn't know whether he took certain figures into consideration or not.

The COURT.—He means, if these figures were carried forward in the totals, as appears to have been done in many instances, then he took them into consideration; if they were dropped, instead of being carried forward in the totals, the amount then upon the barge was taken and the barge started anew.

Mr. McCUTCHEON.—Isn't it quite apparent that it is not from the statement of the figures?

Q. Will you go back and give us the deliveries to that barge?

The COURT.—It was 14 tons and 990 tons, or whatever it was, from January 14th to February.

The WITNESS.—That is on February 8th, a total of 1006 tons, 1500 lbs.

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—Q. That is to say, do you mean that with the delivery on January 26th it makes one thousand and odd tons? A. Yes.

Q. Now, find the next delivery, please?

A. The next entry I see, I find rather, is on March 11th; on February 8th it shows 992 tons, 400 lbs. was received from the "Diamond Head"; on March 11th it shows that 992 tons, 400 lbs. was received from the "Invincible," also that 49 tons, 2220 lbs. was received from the offshore bunker; and the "Titania," I [520—465] think it is, 679 tons, 1540 lbs., making a total received of 1736 tons, 780 lbs.

Q. Give me that total again?

A. 1736 tons, 780 lbs.

Q. What have you taken as the total amount received for the purpose of getting your percentage?

A. 881—459.

Q. 881 tons, 459 lbs? A. Yes.

Q. Do you know whether any coal was delivered to the barge after the last date that you have referred to and before she was finally cleaned up?

A. I have not finished going through it yet.

Q. At any rate, if I may interrupt you, you know up to this time, having gone as far as you have, that at least 1700 tons of coal were delivered to the barge, do you not?

A. According to the records, yes.

Q. And for the purpose of determining your percentage you only credited her with 800 and odd tons, didn't you?

A. Yes, as shown by this book.

(Testimony of W. H. Tidwell.)

Q. What do you mean as shown by this book?

A. Exactly what I said.

Q. Leave the book out of consideration. You only credited her with 800 and odd tons?

A. You cannot leave the book out of consideration,—when I used the book in the preparation of the statement.

* * * * *

Q. Does not the book which you have in your hand show that at that time the barge had received 1700 and odd tons.

A. On the date of March 11th it appears to have received 1736 tons, 780 lbs. [521—466]

Q. Now, see if it did not receive some more coal after that?

A. On March 13th it shows a balance of 191 tons, 149 lbs. Then going over to March 27th we find the barge again receiving from the "Wellington" the same amount, 191 tons, 149 lbs.: the "Titania," 107 tons, 1650 lbs.; offshore bunker, 495 tons, 490 lbs.; offshore bunker 87 tons, 410 lbs.; making a total on the barge at this time of 881 tons, 459 lbs.

Q. Now, as I understand you, she had received 1700 odd tons before the deliveries to which you have just testified; what do those deliveries amount to?

A. 881 tons, 459 lbs.

Q. Now go to the next delivery to the barge, if there is another?

A. There appears not to have been any other. On April 1st it shows the same amount.

Q. Well, in round numbers then, Mr. Tidwell, the

(Testimony of W. H. Tidwell.)
barge received 2400 tons of coal.

A. Approximately, yes.

Q. And for the purpose of determining your overrun, or percentage of overrun, you said she had received how much?

A. Just what the book shows, 881 tons, 459 lbs.

Q. Is your percentage of overrun correct?

A. It would appear not.

(Referring to the case of the barge "Comanche," the cleanup of which is recorded in Table C, on March 31, 1909, the witness gives the figures on which he arrived at his percentage of 14 per cent; these figures being 750 tons, 1241 pounds, received into the barge; checked out 858 tons, 1476 pounds, or 108 tons, 235 lbs. more than the barge received.)

[522—467]

Q. Have you not stated here repeatedly that in making this Table C you had credited the barge with all the coal it received and charged it with all the coal it delivered?

A. Yes, in accordance with the records kept by the Western Fuel Company, the totals shown on each cleanup.

Q. Now, will you take the record of Mr. Mills and let us see whether you have credited the barge with all of the coal that Mr. Mills' books show to have been delivered to it on that occasion or during that period?

A. The record of Mr. Mills under date of March 31, shows that the barge had received 750 tons, 1241 lbs., and checked out 858 tons, 1476 lbs.; overage, 108

(Testimony of W. H. Tidwell.)

tons, 235 lbs., which is the same as shown in Exhibit "C."

Q. Have you credited the barge with all of the coal which Mr. Mills' records show to have been delivered to it during that period and for the purpose of determining that overage?

A. Everything that is shown on the date of the cleanup was the only thing I considered in making the record as shown on this report.

* * * * *

Mr. McCUTCHEON.—Q. For the purpose of determining the percentage of overrun on that barge during that period what figure should you take into consideration?

A. So far as I know I have taken into consideration the correct figures.

* * * * *

Q. Is it a fact that in determining these percentages you did not endeavor in any instance to ascertain the entire amount of coal which had been delivered to the barge and the entire amount of coal which had been delivered by the barge? [523—468]

A. I think I have answered that several times, but at the same time I will simply answer it again by saying that I took the totals which were shown on the date of the cleanup of the barge; I did not go back to see where the barge received its coal or the date upon which it was received or the amounts.

Q. Now, will you go back in this particular instance and see what the barge did receive?

* * * * *

(Testimony of W. H. Tidwell.)

A. On February 10th the "Comanche" appears to have received 786 tons, 2110 lbs. from the vessel "Wellington"; it appears again on March 5th as having received 47 tons, 1150 lbs. from the offshore bunkers. There are several dates here, the 13th or the 12th, and Monday, March 15th 1909, offshore bunkers again, 177 tons, 1450 lbs.

Q. Will you look at—Are you looking at your record or at Mr. Mills' record? A. Mr. Mills'

Q. Under what date did you just find that entry?

A. On March 15th; the 13th or 12th also appears here. The same thing appears on the 16th as to receipts, and the same on March 19th as to receipts; March 20th; on March 22d she appears to have received from the steamer "Thor" 802 tons, 1590 lbs. in addition to the amount already received.

Q. What was the next delivery to her?

A. Then she appears to have dropped some of the totals, and she appears again on March 30th, on account of the steamer "Thor," 54 tons, 1671 lbs.; the "Thor" 695 tons, 1810 lbs., or a total of 750 tons, 1241 lbs.

Q. Now, just add that, if you please, to the coal which you have heretofore stated she received; she had theretofore received 1814 tons and some lbs., did she not? [524—469]

A. I will only take into consideration the tons.

Q. You need not take into consideration the lbs. for the purpose of answering this question. She had received 1814 tons. How many tons did she get on the 29th or 30th of March?

(Testimony of W. H. Tidwell.)

A. 695 tons, 1810 tons.

Q. What is the total of that? A. 2509 tons.

Q. Now, for the purpose of determining your very large percentage of 14.43 what did you charge her with having received? A. 750 tons, 1241 lbs.

* * * * *

Q. Now give the total deliveries from the barge during that period?

A. 1760 tons. I am only using the tons.

Q. Very well, that will do.

A. 1760 tons, and add to that 858 tons.

Q. And that makes a total of how much?

A. 2618 tons.

Q. What do you find the barge charged with?

A. Taking all the totals into consideration she is charged with 2509 tons and checked out 2618 tons, 109 tons more than was placed on the barge.

Q. For the purpose of determining your percentage of 22.6, what do you charge the barge with?

A. Where did we get 22.6 per cent?

Q. I mean 14.43. What do you charge the barge with?

A. I don't recall any such figure.

Q. You don't recall that you stated that percentage of overage during that period, that it was 14.43?

A. I do not.

Q. Do you remember what you stated it was?

[525—470]

A. Approximately 14 per cent.

Q. What do you find it to be in fact?

A. I have not figured it.

(Testimony of W. H. Tidwell.)

Q. Will you figure it?

A. Dropping the lbs., it is 14.4.

Q. You find that to be the actual percentage of overrun?

A. In accordance with the out-turn from Mills' books, yes.

Q. You have gone through Mr. Mills' books, and you have the items showing the deliveries of coal to that barge, have you not?

A. Well, that is a different question, Mr. McCutchen.

Q. That is not a different question, that is the question I asked you.

A. No, you did not; you referred to 14.43 per cent and asked me to figure it.

Q. Well, we won't stop to discuss that now; figure the percentage on the actual overrun.

A. It is approximately 4.3 per cent.

Q. 4.3 per cent, considerably less than one-third of the percentage that you state on your direct examination.

A. Yes, if I so testified to that particular item; I do not recall it.

Q. We will take the barge "Melrose" again, deliveries to which began on the 10th of June, 1911, and deliveries from which ended on the 14th of September, 1911, where, according to my recollection, you stated the percentage of overrun to be 24 and a fraction per cent; let me ask you preliminarily, with what have you the barge charged during that period?

A. The barge "Melrose" on September 14, 1911,

(Testimony of W. H. Tidwell.)

Mr. Mills' [526—471] books show 706 tons, 597 or 599 lbs., I don't know which it is—I think it is 599.

Q. And what have you credited it with?

A. 878 tons, 490 lbs.

Q. And you stated that the percentage of overage was 24 and a fraction, did you not?

A. I don't recall testifying to the particular item but I can tell you at the present time what it is; it is approximately that, yes.

Q. Now, what coal did the barge get before the cleanup on September 14th?

A. There appears an item on June 10th of ex-offshore bunkers, N. W. account of "Melrose," 22 tons, 1540 lbs.

Q. Now, give the next one?

A. On June 14, the "Thor," 1043 tons, 1740 lbs., making a total of 1067 tons, 1040 lbs.; the same totals appear on June 15th; on July 6th she appears to have received from the offshore bunkers 595 tons, 1920 lbs., additional, making a total of 1662 tons, 720 lbs., with a total discharge of 707 tons, 761 lbs., leaving a balance in the barge of 954 tons, 2199 lbs. The same entry appears as to totals on July 8th, with a total discharge on this date of 1046 tons, 713 lbs.

Q. Does that include the 707 tons?

A. Oh, yes, that is my understanding. Wait just a minute—yes, it includes the 707 tons. On July 12th it appears again with the same amount of tonnage charged to the barge and having discharged 1400 tons, 2007 lbs.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Q. That was the total discharge up to that date?

A. Yes. Again on July 14th the same amount of tonnage having [527—472] been received and she had discharged 1651 tons, 1045 lbs., leaving a balance of 10 tons, 1915 lbs. in the barge. Again on the 19th she received additional tonnage amounting to 3053 tons, 1200 lbs.

Mr. McCUTCHEN.—Q. Do you mean to say she got 3,000 tons additional or that she got additional coal amounting to that total?

A. She received additional coal amounting to that total.

Mr. ROCHE.—Q. And what was that total?

A. 3053 tons, 1200 lbs.; she discharged 1987 tons, 1810 lbs. On June 20, appears an item, on account of "various," 3053 tons, 1200 lbs.; discharged 2229 tons, 450 lbs.; on the 21st the same entry "various" appears as to 3053 tons, 1200 lbs., with a total discharge of 2375 tons, 1122 lbs.; it appears again on the 15th of August, with a total of 3450 tons, 2180 lbs., with a total discharge of 2645 tons, 282 lbs., a balance of 805 tons, 1898 lbs. On the 16th the same totals appear so far as receipts are concerned; the total discharge on this date, up to and including this date, appears to be 2907 tons, 1223 lbs., a balance of 543 tons, 957 lbs. The next item that I find here—

Mr. OLNEY.—Q. There is one on the 17th, Mr. Tidwell, on August 17th?

A. Yes. Offshore bunkers, "Wellg"—which I presume means Wellington Coal—44 tons, 1780 lbs.;

(Testimony of W. H. Tidwell.)

this balance seems to have been dropped entirely—the balance of 652 tons, 554 lbs.

Q. Mr. Tidwell, that last figure, you have taken the wrong footing, I think; you have the "Nanaimo" instead of the "Melrose"? [528—473]

A. Oh, yes, I see that I have. The balance is 543 tons, 957 lbs., which seems to have been dropped entirely when it is taken up again. In the next instance it shows taking on the barge 44 tons, 1780 lbs.

Q. The next is August 22d?

A. On August 22d the same amount appears, 48 tons, 1070 lbs.

Q. Now, look under the same date, Mr. Tidwell, and you will see the entry of coal taken on.

A. That will follow later with the barge itself.

Mr. McCUTCHEON.—That is 114 tons, 48 lbs.

A. You will find that that follows later. The next item I find on here is September 7th, where she appears to have received from some vessel beginning with the letter "C"—I cannot make out the name of it—230 tons, 1540 lbs.; the "Bovaric," 145 tons, 2219 lbs.; offshore bunkers, 93 tons, 570 lbs.; from another vessel, 70 tons, 1010 lbs.; offshore bunkers, 40 tons, 1070 lbs.; "James Mee Smith" 114 tons, 850 lbs., or a total of 706 tons, 597 lbs.

Q. I think, Mr. Tidwell, you are running over into another set of deliveries to the barge?

A. Yes, I think so myself, Mr. McCutchen.

Mr. ROCHE.—Q. What was that last date?

A. September 7th.

(Testimony of W. H. Tidwell.)

Q. That was before the date of the clearance as indicated in this table (addressing counsel). Have you a table showing this?

Mr. OLNEY.—No, we have no table, but this shows it correctly.

A. (Continuing.) So far as the record goes here it appears that he has dropped this amount 543 tons, 957 lbs., and it does not again appear in these other totals. I am not absolutely [529—474] sure as to that though.

Q. Mr. Tidwell, right in that very connection, if you will turn to the entry of September 7th, that is the final entry of the overage, is it not?

A. No, not on September 7th.

Q. You are right about that; but there he picks up his totals again. Now, you take there the items to the steamer the name of which begins with "C," and the three subsequent items and add them together and you will get the balance which you think he may have dropped on the 16th of August?

A. You refer to the first four items?

Q. Yes. A. I will simply add the tons.

Q. It will bring it to 541 tons, while this is 543?

A. Yes, 541.

Q. The lbs. of course would make up the difference. You have him then under date of September 7th taking up the balance which he had on August 16th, have you not?

A. Well, I could not state that without examining the books more closely to see whether this was received from any other source, or not.

(Testimony of W. H. Tidwell.)

Q. Well, we can check it in another way; you see the items here of 93 tons, 570 lbs., under date of September 7th, do you not? A. 93 tons, 570 lbs., yes.

Mr. ROCHE.—Those are the figures aggregating that total?

Mr. OLNEY.—No, I am calling his attention to that particular item.

Q. Now, turn to August 15th, and you find that same item there, do you not? [530—475]

A. 93 tons, 570 lbs.; that is, offshore bunkers.

Q. Right under it you find on September 7th the item of 73 tons, 1110 lbs? A. Yes, sir.

Q. And you find that again on August 15th, do you not? A. Yes, sir.

Q. So it is apparent, is it not, that he has picked up on September 7th the balance which he had on August 16th? A. It would appear that way.

Q. Then adding to these first four items to which I have called your attention and which represent the balance on August 16th, the two items of 48 tons, 1070 lbs., which she took on since the balance was made—

A. (Intg.) The 48 tons, 1070 lbs. does not appear under date of August 15th.

Q. No, but I say adding to the balance which appears on August 15th the two items of 48 tons, 1070 lbs. and 114 tons, 810 lbs., which she took on subsequent to that date and to which you have already testified and called attention you get the total, do you not?

A. Yes, that seems to be correct. Let me see about

(Testimony of W. H. Tidwell.)

the "James Mee Smith."

Q. It is under date of August 17th?

A. No, not on August 17th the "Tricolor" discharging on that date.

Mr. ROCHE.—Q. August 19th, isn't it?

A. That is the discharge of the barge "Energy." It is on August 23d, the "James Mee Smith" discharged into the vessel 114 tons, 810—no, that is wrong.

Q. You find the 114 tons, 810 lbs. on the 22d, do you not?

A. On both the 22d and 23d, but the date of the discharge is the 23d. [531—476]

Q. And the item of 48 tons, 1070 lbs., is under date of the 22d, from the offshore bunkers?

A. From what source?

Q. Ex-offshore bunkers, in the lower righthand corner? A. Yes, I see it.

Q. Then you take the balance which she had on hand on August 16th and add these two items to which you have just called attention, 48 tons, 1070 lbs., and 114 tons, 810 lbs., and you get a total of 706 tons, 597 lbs., do you not? A. That is correct.

Q. And that is the final total of deliveries to the barge according to your Table C, is it not?

A. Yes, sir.

Q. Now, in order to get a correct statement of the amount of deliveries to the barge, you should add to the 706 tons the difference between 543 tons and 3450 tons, or about 3,000 tons, should you not?

A. Well, it would appear that way, but I would

(Testimony of W. H. Tidwell.)

not be able to positively state that without going through the entire records of deliveries and discharges but it so appears.

Q. It so appears? A. Yes.

Q. So that the total deliveries to the barge during that time would be approximately 3613 tons?

A. It would be more than that; it is more like 4100.

Q. But you have to deduct the 543, which is carried over?

A. Oh, yes, that is correct; it would be 3613.

Q. Now, that 3613 is the correct total of the deliveries to the barge instead of 706, and of course that is subject to any mistakes we may have made in figuring it right here?

A. Certainly, and that is also subject to the facts being that [532—477] this amount here which we have added making 543 tons does really represent this amount.

Mr. McCUTCHEN.—Q. You can get at it the other way if you take your total of 3400 and add to it 114 and also 49, or whatever the amounts are, you will get the same total.

Mr. OLNEY.—Then we have the correct amount as going into the barge, 3613 tons and we have an overage on that amount of 171 tons?

A. As shown by the record here, yes.

Q. The changes that you have made would not change the absolute amount of the overage?

A. I will figure that now to see if the overage is approximately the same. I have not used the lbs.; I make it 172.

(Testimony of W. H. Tidwell.)

Q. I am simply taking your statement here as 171 tons.

A. Well, it is nearer 172 than it is 171; it is approximately 172.

Q. Now, will you take and figure the percentage which the 171 tons of overage bears to the correct amount of deliveries into the barge?

A. It is a little less than 5 per cent.

Q. It is 4.74 per cent; that would be the correct amount of percentage of overrun on this particular loading and unloading of the "Melrose"?

A. Provided that these amounts are correct.

Q. It would be 4.74 per cent as compared with the percentage of 24 which appears according to your Table C?

A. Yes, I believe it was about 24 per cent. Of course, you understand that that is with the understanding that this balance appearing on a different page was carried forward under the name of three or four different vessels on this page. [533—478]

Q. But if the balance was not carried forward, Mr. Tidwell, then to that extent that the balance was not carried forward the absolute overage is reduced, is it not? That would be the effect of it, would it not?

A. Well, now let me see whether that is so or not; no, the overage would appear here just the same, 172 tons.

Q. But my point is this: she had on hand on August 15th a balance of some 500 odd tons in the barge according to the books? A. Yes, sir.

Q. If that balance was not carried forward, if it

(Testimony of W. H. Tidwell.)

were dropped by Mr. Mills through some mistake, it would simply reduce the actual overage finally as compared with the overage which was shown by Mr. Mills' books?

A. If it were dropped entirely it would have no consideration in this case here, it would be a different matter entirely.

Q. In other words, it would have no consideration in his books and his overage would be figured without regard to the amount of coal on hand, which would exceed the amount his books really showed?

A. I don't know that I catch that, Mr. Olney.

Q. I want you to understand this clearly, Mr. Tidwell, and I want the jury to understand it too. My assumption is that he carries forward on August 16th a certain balance, putting it in various items; you say that it may be possible that he did not carry it forward—

A. (Intg.) No, I did not say that, if you will pardon me; I said if he did.

Q. You said that if he did carry it forward then these percentages of 4.75 were correct?

A. Yes. [534—479]

Q. Now, I say to you, that if he did not carry forward his balance it would have the effect of not only reducing the percentage of 4.74 but of reducing his final absolute overrun, would it not?

A. No, sir, it would not, for the reason that on this particular date of August 16th, any coal that went into the barge previous to that time or had been discharged would not be taken into consideration at all

(Testimony of W. H. Tidwell.)

in the cleanup of the barge here; the barge would have had on board so many tons of coal and discharged so many.

Q. The situation would be, if he did not carry forward his balance, that he would have actually on hand—

A. (Intg.) Oh, I think I catch your point now.

Q. I want the jury to catch it too. The situation would be that, if he failed on August 16th to carry forward his balance, then the boat would go on with over 500 tons on board which did not appear in his books at all? A. Yes.

Q. And accordingly, when he came finally to figure his overage he would figure the overage as if she had received 500 less tons than she really got?

A. Yes, that would be true excepting for this reason—

Q. In this particular case it would completely wipe out the overage, would it not?

A. It would be true if the 543 tons were actually on the barge; but if it were simply on paper then of course it would be another matter.

Q. As I understand it, Mr. Tidwell, you are testifying here entirely from these tables?

A. Yes, that is true, but at the same time, now that you have [535—480] gone further than that, you have gone into the book; at the present time we are testifying to the book.

Q. Well, I limited my question then too much there; you have been testifying from the books, have you not? A. Yes, and the tables.

(Testimony of W. H. Tidwell.)

Q. And the tables were prepared from the books?

A. Yes, sir, from the books.

Q. Now, I say, taking the tables as they stand, and if as a matter of fact he has dropped his balance, then it further reduces the percentage and, as a matter of fact, turns the overrun which he got into a shortage, does it not?

A. Yes, that is true, provided as I said before, that the 543 tons was actually coal and was not water.

Q. Now, I will come right back again to that proposition: we are speaking again of the tables, or of the books themselves, and you have limited yourself in your testimony here, Mr. Tidwell, to that fact; now, why do you inject something outside of that?

A. I am merely trying to explain to counsel my idea in the matter.

Q. Yes, but you are not trying to explain in that answer what these tables show or what these books show, are you?

A. We were not testifying as to the tables, we were testifying as to this book.

Q. Exactly, and I say again, Mr. Tidwell, that so far as the books go, if the balance of 500 tons were dropped it means that so far as the books are concerned there was a shortage in this particular case instead of an overage, does it not?

A. Yes, so far as the books are concerned.

Q. And, as I understand you, your testimony is limited to that, is it not?

A. Yes, that is true. [536—481]

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEON.—Q. Now, then, instead of that percentage being—

The COURT.—Instead of being 24 it is 4.3-4?

Mr. McCUTCHEON.—Q. That is to say, this would be one-sixth of what you stated on your direct examination?

The COURT.—Yes.

A. Yes, sir.

* * * * *

Mr. OLNEY.—Q. Have you got Table C there?

A. Yes.

Q. Refer now to page 77, Table C.

Mr. ROCHE.—Is that the page on which the totals appear?

Mr. OLNEY.—Yes.

Q. On page 77 of Table "C" you have totaled the deliveries into the barges by years, have you not?

A. Yes.

Q. And you have obtained a figure of some 563,779 tons for the period of 1906 to 1912 inclusive?

A. That is true.

Q. And during that same period, you have found an overrun of some 33,233 tons?

A. Yes, which appears on page 80.

Q. And you testified also, did you not, that the percentage of overrun, of barge overrun, was about 6 per cent? A. That is true.

Q. Now, that 6 per cent was obtained by figuring the percentage which 33,233 tons bears to this amount which went into the barges, of 563,759 tons?

A. That is correct.

(Testimony of W. H. Tidwell.)

Q. Now, in getting this total of 563,759 tons, you have considered, have you not, simply the deliveries into the barges as shown by Table C?

A. Yes. [537—482]

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [538]

Q. In other words, wherever a balance was struck and taken up by Mr. Mills in the manner that has been indicated here, the deliveries which were so lost sight of and carried forward simply in the form of a difference, are not carried into your totals?

A. No, merely the totals as shown on the date of cleanup in Mr. Mills' books.

Q. In other words, take this particular case about which I was examining you a minute ago, and it appeared that some 2900 tons in that one case alone had been dropped out. Now, that 2900 tons is dropped out of your total, is it not?

A. Well, yes, I should say it was. I should state that, to the best of my information. I could not say it is positively, but if it is, I don't know where it is taken up.

Q. On the other hand, the carrying forward of this balance in the way indicated does not affect the total overrun, the absolute total run?

Mr. ROCHE.—In tons?

A. No, I should say not; that is also subject to the same answer.

Mr. OLNEY.—Q. So, as a matter of fact, this figure of 563,000 tons which you have as going into the barges and upon which you have figured your per-

(Testimony of W. H. Tidwell.)

centage of 6 per cent, should be increased by the amount of every one of these balances which Mills has carried forward in the way indicated?

A. Yes, I should say so.

Q. So that your percentage of 6 per cent would be proportionately reduced?

Mr. ROCHE.—Of course, you understand, Mr. Olney, that the discharges would likewise have to be added in here.

Mr. McCUTCHEN.—As far as that goes, the discharges are in there. In order to get at that point, I ask this question, [539—483] and I will ask it again, the carrying forward of these balances by Mr. Mills, and the failure to include them in total receipts, or rather the failure to include the deliveries upon which the balances are disputed in Table C does not affect the gross amount in tons of the overage.

A. I don't think it would materially affect it.

Q. It would not affect it in any way?

A. I am inclined to think it would not.

Q. The final result of it is that as a matter of fact, according to Mr. Mills' books more coal went into the barges than is shown by Table C, and the percentage of overrun is less than you have figured it out, 6 per cent?

A. If the three or four that you have called attention to are all, this would not materially reduce the per cent.

Q. I suppose there are a great many others?

A. It would depend on how many there were.

(Testimony of W. H. Tidwell.)

Q. But to the extent to which they exist, what I have indicated as true would be true, would it not?

A. Yes.

Q. Now, you have made no investigation to ascertain to what extent this is true, this dropping of deliveries and carrying them forward by way of balances, have you?

A. No, I have only made investigation as to the ones which you have called attention to, presuming, of course, that was all.

Q. What right had you to presume that?

A. Because I thought you would call attention to them if there were others.

* * * * *

Mr. OLNEY.—I would say, Mr. Tidwell, there are others, if you want the information. How many there are, we, ourselves, do not know as yet. [540—484]

Mr. ROCHE.—I understood Mr. McCutchen to say they were incorrect in every instance.

Mr. MOORE.—They practically run through the whole business, whenever a barge accepts any large amount of coal that ran into a large number of items.

Mr. McCUTCHEN.—Let me ask the witness in that connection if he will take the time to see whether he has found any error in favor of the defendants in the statement that he has presented. Will you do that?

The WITNESS.—I don't know that I understand your question.

Q. We have shown you several very glaring errors

(Testimony of W. H. Tidwell.)

in the statement of percentages to the disadvantage of the defendants, have we not?

A. You mean as far as the record is concerned?

Q. Yes. A. Yes.

Q. Will you take the time to see whether you can find if you have made any error in favor of the defendants in the statement of any of those percentages?

A. You mean with this?

Q. No, the percentages you stated on your direct examination.

A. I have accepted what was shown by the books, whether it was for or against the defendants.

Mr. McCUTCHEON.—We did not think it was necessary to cover all of this, but in view of the statement of the witness, we will have to consume some more time.

(Referring to the case of the barge "Theobold," which discharged on September 29th, 1909, and tracing back the entries in Mr. Mills' diaries with reference to that barge, and [541—485] comparing them with Table C, the witness proceeded with his testimony as is hereinafter immediately set forth.)

Q. On September 27, do you know that she still had 951 tons, 480 pounds on?

A. On September 27th—I have traced it down to September 1, that she has 370.

Q. Did you find in your tracing a balance?

A. Yes, there is a balance there of 370 tons.

Q. And isn't the result of that balance in this case the same as indicated in the previous case, about

(Testimony of W. H. Tidwell.)

which you have been examined this morning?

A. That I could not tell you, I do not know.

Q. Will you kindly ascertain?

A. I am attempting to. Now, again, on September 15 it appears "Theobold" and the first two items on the page make approximately the same as the balance carried forward from September 1; the balance is 370, and the items appearing under September 15 are 50 tons and 319 tons, which would be 369 tons.

Q. Where are you carrying that forward from?

A. From September 1 to September 15.

Q. Now, it shows, does it not—Mr. Mills' book shows on September 1 that there had been loaded into the barge "Theobold" 2554 tons?

A. Yes, and odd pounds.

Q. And odd pounds, yes. And that she had a balance on hand at that date after certain deliveries of 370 tons? A. Yes.

Q. Now, it appears, does it not, from the item under date of September 15, that he has not carried forward these deliveries of 2554 tons into the barge "Theobold," but has carried forward. [542—486] simply the balance which he had on hand the first of September?

A. No, it does not show the balance carried forward at all, the 370 tons.

Q. Just take these items. A balance is shown as 370 tons 1068 pounds. A. That is true.

Q. And among the deliveries there is a delivery of 319 tons, 2010 pounds, is there not?

A. Yes, that is true, that is on the 15th.

(Testimony of W. H. Tidwell.)

Q. And you find also on the 15th—did you say you found this 319 tons 2010 pounds under the 15th?

A. Yes.

Q. You also find that item under the first, do you not? A. Yes, it is the "Titania."

Q. And you add to that amount the first item which you find under the 15th of 50 tons, 1298 pounds, and you get the balance, do you not, of 370 tons, 1068 pounds, which he had on the first?

A. Yes, approximately that ; I have not figured the pounds.

Q. Does not that indicate that Mr. Mills carried forward his balances and did not carry forward the amounts which had been charged into the barge?

A. It would indicate it.

Q. So that this, again, is another case in which the actual percentage of overrun, the percentage of overrun, should be reduced?

A. Well, I don't see why it is checked out there.

Q. We will ask you to check it out during the recess.

Mr. ROCHE.—Of course, you will concede the overage so far as the tonnage would be concerned, would be the same.

Mr. MOORE.—Yes.

Mr. OLNEY.—In this particular case. [543—487]

Mr. MOORE.—As the coal received in the barge is much greater than these tables charge it with, the percentage is reduced accordingly.

Mr. ROCHE.—Of course, there is no question about that, so far as the percentage is concerned, but

(Testimony of W. H. Tidwell.)

the excess coal tonnage at least remains the same.

Mr. MOORE.—But instead of being 5.8 per cent, the percentage should be about 2 per cent.

Continuing the discussion of the barge "Theobold," the testimony proceeds as follows:

A. On September 1st, 1909, the barge "Theobold" appears to have had on board 2554 tons, 670 lbs., and had discharged 2183 tons, 1842 lbs., leaving a balance of 370 tons, 1068 lbs. It appears again on September 21st with a total of 1048 tons, 988 lbs., and there was discharged 1081 tons, 1872 lbs., which shows an average of 33 tons, 884 lbs.; and also the figures 807, which evidently refer to tons, and 786, which probably refers to lbs. * * * On the 24th the barge appears to have a total of 951 tons, 418 lbs., and to have discharged 125 tons, 896 lbs. It appears again on September 29th with the same total so far as receipts are concerned, with a total discharge of 1078 tons, 1030 lbs. Now, as to the total amount received in the barge—I will simply use the tons and not the lbs. in the calculation which I will make—the barge appears to have received a total of 4183 tons and discharged 4342 tons.

Q. Making a difference of what?

A. Making a difference of 159 tons.

Q. And the percentage there is what?

A. About 4 per cent. [544—488]

Q. Just go over that again, please, Mr. Tidwell, and let us have the coal received by that barge.

A. 2554 tons.

Q. On what date?

(Testimony of W. H. Tidwell.)

A. That was on various dates, but that was the total on September 1st.

Q. What are the various dates?

A. I don't know how far back that goes, I didn't look that up; she appears on August 12th as having received 428 tons, 648 lbs., from the vessel "Thor."

Q. Was that the first delivery made to her?

A. That is the first that I have located here.

Q. If I may interrupt you a moment, Mr. Tidwell, what is the overage shown on your Table C?

A. I think it is 127.

Mr. ROCHE.—In other words, the books of Mr. Mills show a greater overage than the tabulation, so far as excess tonnage is concerned.

Mr. OLNEY.—The overage shown by Mr. Mills' books is 127 tons.

The WITNESS.—This is 169 tons.

Mr. ROCHE.—That is true, Mr. Olney, so far as the overage is concerned at the time the barge cleared, but as a matter of fact the actual excess tonnage as testified to by the witness is 159 tons. That is one of the instances where the error, if there was any error, was for the benefit of the defendants.

A. (Continuing.) On August 14th the barge seems to have had a cleanup, with an overage of 85 tons, and then she starts in again—that was on the 11th, I should have said the 11th instead of the 14th. [545—489]

The witness here continues tracing the coaling operations on the barge from August 12th to September 21st, and his testimony proceeds then as follows:

(Testimony of W. H. Tidwell.)

On the 21st, 1048 tons, 988 lbs., received, and a discharge of 1081 tons, 1872 lbs. And on the side appears the words "over 33 tons, 884 lbs.," and also the figures "807—786," with two items in the figures stricken out in red ink.

Mr. ROCHE.—Q. As a matter of fact, the books show that a certain amount of coal was carried forward notwithstanding the figures and language indicating a clearance; is not that correct?

A. Yes. Those particular items seem to be stricken out. There appears to have been a cleanup there, but at the same time the other figure appears there of 807, which he may have carried forward and may not. It appears again on September 24th, with a total of 951 tons, 480 lbs., and with a discharge of 125 tons, 896 lbs. Again on the 27th, total receipts, 951 tons, 480 lbs., and a total discharge of 526 tons, 1774 lbs. On the 28th the same receipts appear, with a total discharge of 945 tons, 654 lbs. Again on the 29th, the date of the cleanup, 954 tons, and 480 lbs. received and 1078 tons and 1030 lbs. discharged; overage, 127 tons, 550 lbs.

Q. You have finished that now, have you?

A. Yes, sir.

Q. Now, I understood you to say in answer to a suggestion by Mr. Roche, that these figures which you have just developed here, were more favorable to the defendant than the figures which you had previously given in Table C; is that true?

A. I don't recall making any such remark.

Q. Well, Mr. Roche made that statement; do you

(Testimony of W. H. Tidwell.)

agree with it? [546—490]

A. This is more favorable, yes; it gives a balance; that is, it gives a greater overage, of 160 tons, but the percentage of course is less than the amount which would be shown by taking simply this table into consideration.

Q. Turn to that transaction in Exhibit "C."

Mr. ROCHE.—It is on page 44.

A. Yes, I have it.

Mr. McCUTCHEN.—Q. What are the total deliveries to the barge there? A. 951 tons, 480 lbs.

Q. What is the total overage which you have there?

A. 127 tons.

Q. What is the percentage of overage according to your Table C which you say was made up from these books? A. It is about 12½ or 13 per cent.

Q. It is over 13 per cent, is it not?

A. About that.

Q. What is your percentage of overage as you have derived it from these detail figures you have given us? A. About 4.

Q. And do you say that 13 per cent is more favorable to the defendants than 4 per cent would be?

Mr. ROCHE.—Just one moment, we object—

The COURT.—He did not say that and did not pretend to say it. He said that the amount of overage was greater and the percentage less.

* * * * *

Mr. McCUTCHEN.—Q. Will you see if you can identify in "Exhibit C" the tabulation which shows or which is intended to show the receipts of coal and

(Testimony of W. H. Tidwell.)

the discharge of coal from the barge "Melrose" beginning February 11, 1911, and ending April 6th of that year? [547—491]

Mr. ROCHE.—It appears on page 60 of your Table C, I have it here.

Mr. McCUTCHEN.—Q. The overage in that case appears to be 47 tons, 849 lbs., does it not, according to your Table C? A. Yes, sir.

Q. And according to your Table C what was the total delivery to the barge? A. 1429 tons, 462 lbs.

Q. Oh, no, you are evidently looking at the wrong column.

A. Oh, pardon me, 1381 tons, 1853 lbs.

Q. Have you given me from Table C the total deliveries to the barge on that occasion?

A. As shown by the cleanup?

Q. Well, will you look at Mr. Mills' books and see whether you have given the total deliveries to the barge?

A. I find on April 6th that the barge had received 1381 tons, 1853 lbs., and had discharged 1429 tons, 462 lbs., overage 47 tons, 849 lbs.

Q. Those are the totals you have used in preparing Exhibit "C," are they not? A. Yes.

Q. Now, I ask you if you will give the details of the deliveries to and discharges from that barge?

Mr. ROCHE.—What is the date upon which the barge first took coal?

Mr. McCUTCHEN.—February 11th.

Mr. ROCHE.—That may assist you, Mr. Tidwell.

A. The first date that I find is February 10th; 161

(Testimony of W. H. Tidwell.)

tons, 1659 lbs., from the vessel "Puritan"; on the following day she appears to have received at that time 884 tons, 1539 lbs., from the "Puritan." It also appears that on the 15th she had received an additional tonnage of 27 tons, 1210 lbs. from the offshore [548—492] bunker. Do you want me to include in this the discharges as we go along?

Q. I want you to include all the figures necessary for you to be able to tell what the percentage of overage was.

A. It appears on several dates intervening, but I will go to the totals. It appears on February 23d with a total of 1812 tons, 1359 lbs., and a total discharge of 1305 tons, 320 lbs.

The witness here continues tracing the receipt and discharge of coal on the barge "Melrose" on various dates intervening between February 23d and April 5th, and then the testimony continues as follows:

On April 6th, the date of the cleanup, 1381 tons, 1853 lbs.; total discharge 1429 tons, 462 lbs.; over, 47 tons, 849 lbs.

Q. What was the total amount of coal which the barge received during that period?

A. I will only use the tons again, as I have previously. The total amount received was 3421 tons, the amount discharged was 3468 tons, a difference of 47 tons.

Q. And what is the percentage?

A. It is about 1½.

Q. A little less than 1.4, is it not?

A. I have not figured it out to the decimal.

(Testimony of W. H. Tidwell.)

Q. What did you credit the barge with having received in your Exhibit "C"?

A. The figure I have already testified to, 1381 tons, 1853 lbs.

Q. And in that way you get a percentage of 3.46, do you not?

A. I don't know; I have not figured the percentage; I presume that is the fact. [549—493]

Q. You can tell by a very casual inspection of those figures that it would be more than twice the percentage you would get by using all of your figures, that is to say, by taking all the coal that went into the barge and all that came out of the barge?

A. Yes, that is right.

Q. You say you charged the barge in that case with 1381 tons?

A. I don't say I did, I say the records charge it with that amount.

Q. That is the quantity in your Exhibit "C"?

A. Yes, sir.

Q. And you find that the actual quantity that went into the barge was 3421 tons according to Mr. Mills' books? A. Yes, sir.

Q. So that 2040 tons of delivery of coal to that barge do not figure in your Exhibit "C" at all?

A. Whatever the difference is.

Q. As to that extent at any rate Exhibit "C" fails to represent the total delivered to the barge as shown by the Mills' books.

A. Exhibit "C" has never proposed to represent

(Testimony of W. H. Tidwell.)

anything but the out-turn of the Mills' books, the out-turn of each barge.

Q. Does it show the out-turn on this particular barge? A. It does.

* * * * *

Mr. STANLEY MOORE.—If your Honor please, just a question or two in respect to the laying of a foundation, and then the cross-examination will be through.

Q. Mr. Tidwell, you testified here yesterday that neither directly nor indirectly have you made any arrangement with any newspaper in regard to giving it a preference as to news or as to a scoop or the inside of the story, however it might be termed, respecting this matter, did you not?

* * * * *

[550—494]

A. Yes, sir.

Q. Now, I want to ask you, Mr. Tidwell, and directing your attention particularly so far as the first occasion is concerned to the month of February of last year, February, 1913, I want to ask you whether or not in the office of the collector in this city and county, the collector then being Mr. Frederick S. Stratton, and he being present and you being present, if Mr. Stratton, having sent for you, did not say to you, "Mr. Tidwell, the representatives of the newspapers are complaining to me, the representative of the "Chronicle," of the "Examiner" and of the "Post," and they are claiming that you have made some kind of an arrangement with the "Bulletin"

(Testimony of W. H. Tidwell.)

that you are giving them the preference as to the news with respect to this Western Fuel matter. Now, Mr. Tidwell, is it true? Have you made any such arrangement as that?"

* * * * *

Q. (Continuing.) And when Mr. Stratton asked you, Mr. Tidwell, "Is that true," did you not then and there reply, "Yes, it is"; and did not Mr. Stratton thereupon say to you, "Mr. Tidwell, why did you make any such arrangement as that," and did you not then say, "Well, I have made the arrangement," and mentioned something in that behalf in connection with a Mr. Powers, and did you not then and there further continue and say, "And moreover, I have written to Washington, or I have written to my Chief about it, and they know about my having made that arrangement"?

A. The conversation as related by you to a certain extent took place between Collector Stratton and myself, not entirely, but it had no reference to the Western Fuel case; it had reference to the case of Robert Donaldson, who was indicted for opium smuggling. [551—495]

Just state, Mr. Tidwell, if I may be permitted to ask you, did you not say in that conversation, "I have written back to Washington and my position has been approved"?

A. I recall nothing of that character.

Q. Well, as a matter of fact, did you write back to Washington respecting any special arrangement made with the "Bulletin" either concerning the case

(Testimony of W. H. Tidwell.)

of Mr. Robert Donaldson or the case of the Western Fuel Company?

* * * * *

A. I deny writing any such letter.

* * * * *

A. (Continuing.) And I would like to explain it if I may be permitted to do so.

* * * * *

A. (Continuing.) Sometime early in the year 1912, the date I do not recall, two newspaper representatives of the "Bulletin," Mr. Masters and Mr. Gleason came into my office and stated that they had certain information concerning opium smuggling by one Donaldson which had been given to them by a man by the name of Powers, and if I would like to get in touch with the matter they would see that I met Powers. They also stated that Powers had some other information concerning the false weighing of coal. In a few days Powers came into my office. At the same time either Mr. Gleason or Mr. Masters, I don't know which, said, "Of course, you know what we want in this matter." A few days later Powers came into my office and I had a talk with him concerning both the opium smuggling and the Western Fuel matter, which I brought out to some extent from him. Later I obtained a statement from Powers in writing concerning the Western Fuel matter, also as to the opium smuggling matter. In the due course of time— [552—496] at that time I took up the question of the smuggling of opium by Donaldson, investigated the case, and in due time presented it

(Testimony of W. H. Tidwell.)

to the United States Grand Jury, and on the date on which the case was presented to the United States Grand Jury Mr. Gleason again appeared at my office and said, as I recall the conversation, "When will you present the Donaldson case?" I said, "I think this afternoon." That was all the conversation that I recall having had with Mr. Gleason or with Mr. Masters in connection with the matter. Sometime later—I will lead up now to the conversation with Collector Stratton; sometime later—on the same date, I think it was, the representative of the "Post" said that he understood that I had given a story to the "Bulletin," and wanted to know if I would give it to the "Post." I told him that I had not given any story to the "Bulletin," nor would I give any to the "Post." He then went, as I understood later, to Collector Stratton's office and complained about the "Bulletin" getting the news and the "Post" not obtaining it. Later Collector Stratton—and I hate to relate this part of it—Collector Stratton and I had a very serious disagreement. Collector Stratton made a number of detrimental remarks about me, and in addition to that accused me, as I have understood—not personally, but I understood that he made such remarks—that I had an understanding with the "Bulletin" by which I was to give it all the information that I had, not only concerning opium but about the Western Fuel case, which was absolutely false in every respect. There was never any understanding that either Mr. Gleason or Mr. Masters would obtain anything at all regarding the Western Fuel

(Testimony of W. H. Tidwell.)

case, and I have not given Mr. Masters or Mr. Gleason or any other newspaper reporter any information except in a general manner concerning the Western Fuel case. [553—497] To illustrate the general manner that I speak of, I mean meeting them in the hall after I leave the courtroom in the afternoons and they would say, "What are you going to do tomorrow," or something of that kind or character, just casual matters. But there was never any understanding that any newspaper, or newspaper man, or any newspaper itself would obtain any exclusive story or any inside information concerning the Westren Fuel case.

Mr. STANLEY MOORE.—Q. Now, Mr. Tidwell, before making the explanation you stated that you never did as a matter of fact write a letter back to the authorities at Washington concerning any arrangement with any particular newspaper; that is your testimony, is it?

A. I don't recall writing such a letter, Mr. Moore. I know that Mr. Stratton made such a statement and in reply to that I answered it; it was referred to me for answer and I answered it.

Q. Well, Mr. Tidwell, did you, or not, state to Mr. Stratton, in the course of that conversation, whether in point of fact you had or had not written back to Washington, did you state to Mr. Stratton in the course of that conversation that they knew about this arrangement back in Washington, or you had written it to your chief, and he approved of it?

A. I don't recall anything of that kind or character.

(Testimony of W. H. Tidwell.)

Q. Is it simply that you don't recall whether in fact you made such a statement?

A. I should say that I did not, Mr. Moore, because I think I would recall it if I did. As I said before, Mr. Stratton and I were not on good terms at all and I was always rather careful and would watch all of my remarks with him; in fact, at the end of his administration we were not on speaking terms.

[554—498]

Q. Mr. Tidwell, can you remember positively one way or the other about that?

A. I should say that I did not.

* * * * *

Mr. STANLEY MOORE.—Q. Did or did not Mr. Stratton say to you in that conversation that the reporter of the "Post," the reporter of the "Chronicle," and the reporter of the "Examiner," all three, had complained to him and claimed that you had such an arrangement with the "Bulletin" respecting the Western Fuel case? A. No, sir.

* * * * *

Mr. STANLEY MOORE.—Q. Now, I want to ask you this further question, Mr. Tidwell, and this is also with respect to foundation: Was not that matter or claim mentioned on a number of occasions, to the number of half a dozen different times between yourself and Collector Stratton, this matter of the claim or the complaint in regard to this arrangement or alleged arrangement with the "Bulletin"?

* * * * *

A. I do not recall it. I remember this particular

(Testimony of W. H. Tidwell.)

occasion in connection with the "Post," but I do not recall any other; but that was in connection with the Donaldson case.

Mr. STANLEY MOORE.—Q. You do not recall the matter ever coming up in conversation between you then, as I understand it, except upon one occasion; is that correct?

A. I don't recall any. He might have mentioned it; I don't recall.

Q. And that is the extent of your recollection, the one occasion?

A. That is all, when the "Post," I think it was, complained [555—499] to him that the "Bulletin" was getting certain information which they were unable to obtain.

Q. Well, the point of my question is, Mr. Tidwell, and I will only ask it once more, do you remember a conversation between you and Mr. Stratton upon that subject-matter upon more than one occasion?

A. I do not.

Q. The question included, of course, that it was at the Collector's office, and in the City and County of San Francisco; you understood that, did you not?

A. Yes. I think that is where I had the conversation with him about the opium transaction.

The date, June 24th, 1913, to which I testified yesterday as the date of my conversation with the collector of the port, when I protested against the Western Fuel Company being permitted to use the records of the custom-house, was several weeks before Mr. Sullivan or Mr. Roche had any connection with this case.

(Testimony of W. H. Tidwell.)

(Admitted by counsel for the prosecution that it was several weeks thereafter, that is after said appointment of Messrs. Sullivan and Roche, that any formal request or subpoena was issued against the Western Fuel Company, calling for the production of their books and papers, and that such subpoena was issued some time in the early part of August, 1913.)

Q. Is it not the fact that papers and books—all of them,—requested by you, of whatever nature, prior to the time of the indictment had been furnished you? [556—500]

* * * * *

A. No, our original subpoena asked for all books and records.

Q. And as to that subpoena, Mr. Tidwell, there was an agreement that they would allow you to go down there, was there not?

A. Yes, that they would furnish all books and records whenever they were desired.

Q. And you went down there pursuant to that understanding, did you not, together with your assistant? A. Yes, sir.

Q. Now, I want to ask you, after you went down there into the offices of the Western Fuel Company with your assistants whether or not you asked for a single book or paper which was refused you?

A. I did not want all of the books and papers at that particular time. I was working on certain records which are represented by Exhibits "A," "B" and "C"; after the completion of those records they

(Testimony of W. H. Tidwell.)

were returned, and it was my desire to look over other records of the Western Fuel Company; on one occasion a request was made on Mr. Norcross by telephone, and as I remember it, Mr. Norcross agreed to furnish the records; later I was advised that under the advice of Mr. Olney they would not be furnished; the matter was then taken up with Mr. McNab, who was the then District Attorney, and he authorized me to talk with Mr. Olney over the telephone concerning the matter; those particular records at that time were supplied. Later it was the desire to go further into the matter, and about that time, so far as I can remember now, Mr. McNab's resignation occurred, or soon after that. There were certain parties came into the custom-house, and I think one was W. B. Billinghall, custom-house broker for the Western Fuel Company, [557—501] and were going over the custom-house records for the Western Fuel Company, and I learned that such was being done and I objected to it to Collector Stratton.

Q. That concludes your answer, does it?

A. I think that answers your question fully.

Q. Mr. Tidwell, you went a little ahead of my question, and I am going to go back again just briefly. The question was addressed to the time when you were down in the office of the Western Fuel Company with your assistants.

A. I was there only for a few days.

Q. Were you not there over two weeks?

A. I don't think so.

* * * * *

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—Q. Then, Mr. Tidwell, what refusal of papers had there been to you by the Western Fuel Company? What papers did you ask for that you had not actually obtained prior to June 24, 1913? A. I asked for the financial records.

Q. Were they not given to you?

A. I never had the financial records until recently.

Q. Who did you ask for them?

A. Mr. Norcross.

Q. When did you ask for them?

A. The date I made no note of.

Q. Was it prior or subsequent to the 24th of June?

A. That I cannot answer. I do not know. I made no note of it, not even a mental note of it. I should say it was before that.

Q. Then I come back to you with the question again, Mr. Tidwell, do you mean to be understood as testifying here that there was any paper that you asked for of the Western Fuel Company prior to the date of this interview of June 24th [558—502] with the collector—any paper prior to that time that you did not get?

A. I have just answered that question that to my best remembrance it was before that, and that is the reason I asked the collector not to permit the Western Fuel people to look over the records. As to the exact date I am unable to say.

Q. Did you state to the collector that they had refused you any papers? A. I don't recall that.

Q. What reason, if any, did you give in your conversation with the collector?

(Testimony of W. H. Tidwell.)

A. I don't recall that.

I don't recall giving as the reason that the documents requested by the Western Fuel Company were not public documents.

Mr. OLNEY.—Your Honor, may I ask the witness a question along this same line?

The COURT.—Yes.

Mr. OLNEY.—Q. You testified that you asked for their financial books of the Western Fuel Company, and that you did not get them and that in your opinion that was prior to June 24, 1912?

A. That is my best remembrance. I cannot state as to the exact date but that is to the best of my remembrance.

Q. I will ask you if your failure to get them was due to any refusal on the part of the Western Fuel Company to let you see them or to produce them at your request?

Mr. ROCHE.—I object to the question as immaterial.

The COURT.—I don't know whether it is, or not. I think the whole matter is a good deal beside the mark. The objection will be overruled. [559—503]

A. My request for them was a telephone message to Mr. Norcross and, as I remember it, I had no response to it except that he said at that time they would be supplied, but they never were supplied.

Q. But you did not follow the matter up with any further request for them, did you?

A. If I remember correctly, Mr. Norcross was to take the matter up with you and it would then be

(Testimony of W. H. Tidwell.)

decided, but I had no response to my request for them.

Q. And you did not take the matter up with me, did you?

A. No, I did not take it up with you. As I understood it, Mr. Norcross was going to take it up with you.

Redirect Examination by Mr. ROCHE.

* * * * *

Mr. ROCHE.—Q. Did you, Mr. Tidwell, during the noon recess, so far as you were able to, go over and compare some of the entries in Exhibit "C" with the entries contained in the diaries kept by the defendant, Mills? A. I did.

Q. And are you prepared to testify at this time that at least in some instances and to the extent to which you were able to go over those books and compare them, the figures contained in Exhibit "C" even so far as percentages are concerned, are correct?

A. Yes, sir.

Q. I would like to have you explain, Mr. Tidwell, very briefly, because I only want to ask you this one question on that subject, how it came about that Table C did not contain all of the deliveries of coal to the barges?

A. For the simple reason that in preparing the table, I accepted [560—504] the records of Mr. Mills as being correct, and took the totals at the date of the out-turn, or the date of the cleanup, as it is called; I accepted the total receipts as being correct, and also the total out-turn as being correct, as well

(Testimony of W. H. Tidwell.)
as the total overage.

Q. Now, let me ask you this question: Irrespective of the question of percentages, would any single one of these inaccuracies called to your attention by Mr. McCutchen, or all of them together, in any way affect the total tonnage of excess so far as quantity is concerned?

A. You mean as to the amount received and discharged?

Q. Yes, as to the amount of overage.

A. No, sir.

Q. In other words, it simply affects the percentage; is that correct?

A. The percentage on a particular barge.

Q. The percentage upon a particular barge?

A. Yes, and it would also affect the total percentage.

Q. That is, the total percentage so far as the excess quantity of coal delivered from the barges is concerned? A. Yes.

Q. You testified the other day that there was approximately 44,000 tons of coal discharged from the barges in excess of the quantity of coal checked in or laden from the barges between January 1, 1904, and December 31, 1912.

* * * * *

A. Yes, approximately, 43,000 tons.

Q. Is it not true that none of these alleged inaccuracies in any way affects that total result?

A. None whatsoever. [561—505]

Q. In testifying the other day Mr. Tidwell, you

(Testimony of W. H. Tidwell.)

also gave to the jury the total excess sales above coal received during a given period; you recall that testimony, do you not? A. Yes, sir.

Q. In other words, you took the quantity of coal on hand upon the first day of April, 1906, together with coal received from that date to and including the 31st day of December, 1912, and likewise took into consideration the quantity of coal sold during that time, together with the coal on hand on the 31st day of December, 1912; you recall that testimony?

The COURT.—And certain coal burned, yes.

Mr. ROCHE.—Yes, your Honor, and when I refer to that, I mean foreign coal.

Q. Do any of these inaccuracies to which you have testified in any way change, or affect, or alter, or minimize the total quantity of coal sold by the Western Fuel Company above the coal received?

A. I should say not at all.

Q. And is it not also true, Mr. Tidwell, that it does not even change the percentage of the total excess of coal sold over coal received? A. No, sir.

Q. You were questioned yesterday upon cross-examination by Mr. McCutchen concerning certain shortages which from time to time appeared on the records kept by the defendant, Mills, as to which you made no memorandum and none of which is shown in Exhibit "C"; you recall that testimony, do you?

A. I don't quite catch that question.

Q. That is, the shortages, so far as the discharge from the barges is concerned? A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Just state very briefly the reason why you made no memorandum or no table relating to these shortages?

The COURT.—He said yesterday it was because the Government was not paying any drawbacks on those shortages.

Mr. ROCHE.—Very well, your Honor.

Q. Mr. Tidwell, in going over the diary books kept by Mr. Mills, did you ascertain whether there were very many instances of shortages, or of a comparatively few? A. Comparatively few.

* * * * *

Q. Do you know whether you very frequently ran across a shortage?

A. Very few, in the preparation of these statements, comparatively speaking.

Q. You were examined the other day in relation to certain bills sent by the Western Fuel office at Nanaimo to the Western Fuel office at San Francisco, accompanying bills of lading showing the quantities of coal discharged into certain boats in excess of the bill of lading and invoice figures; do you recall that testimony?

A. I don't know what bills you are referring to.

Q. I am talking about the bills that were sent from the Western Fuel Company's office at Nanaimo to the Western Fuel Company at San Francisco, showing quantities of coal laden upon steamships in which coal was imported from British Columbia to California.

A. Do you mean where the word "actual" is?

(Testimony of W. H. Tidwell.)

Q. Yes. A. I have not testified to those.

Q. But you recall your attention being directed to them? A. Oh, yes.

Q. I ask you if, since your direct examination was concluded, a [563—507] table was prepared by you compiled from those bills, showing the quantity of coal indicated upon the face of the bill as having been the actual quantity of coal discharged into the ship, and the invoice weight, which likewise is the bill of lading weight, and also the ascertained weight?

A. Yes, it was prepared by three of us together.

Q. And was it checked up by you?

A. The final check was made by another party.

Q. I will ask you whether in that table an estimate was made of the difference between what upon the face of these bills is designated and known as the actual weight of the coal discharged into the steamship and the discharged weight here, the out-turn weight? A. Yes, sir.

Mr. McCUTCHEON.—Do you mean, is there a subtraction made?

Mr. ROCHE.—Yes.

Q. In other words, the out-turn weight or custom-house weight at San Francisco was subtracted from the quantity of coal indicated upon the face of the bill as the actual weight of the coal and the difference shown; is that correct? A. Yes, sir.

Q. And likewise an estimate made of the percentage showing the difference between the two figures?

A. Yes, sir.

(Testimony of W. H. Tidwell.)

Q. Now, I will ask you if it is not true that in a great many instances what appears in Exhibit "A" to be an overage is in fact, assuming that these bills show the actual quantity of coal discharged into the steamship, a shortage? A. Yes, sir.

Q. In other words, Mr. Tidwell, for the purpose of illustration and I will only put one question to you upon this subject, in [564—508] Exhibit "A" it sometimes occurred that the out-turn weight or the custom-house weight showed that there was more coal discharged from the ship than the bill of lading indicated was in the ship; that is correct, is it not?

A. Yes, sir.

Q. And in Exhibit "A," of course, that difference was treated as an overage, was it not?

A. As an overage, yes, sir.

Q. Now, it is also true, is it not, that in a great many instances, if you take the bills as correctly setting forth the actual weight of the coal deposited into the steamship at the port of exportation, that instead of there being a shortage, or rather, I should say, instead of there being an overage, there would, in fact, be a shortage? A. A shortage, yes, sir.

Q. Now, I want to call your attention to these bills. I have these bills separated, and a table compiled from them. Those are the bills to which you refer, are they not? A. They are.

Q. And this is the table which has been prepared, as you have stated, with some assistance, and checked over by all three of you; is that correct?

(Testimony of W. H. Tidwell.)

A. I checked part of it; the final check was made by others.

Mr. ROCHE.—We offer these bills in evidence, may it please the Court, and they may be considered, I suppose, as one exhibit, and they may be considered as having been read. These bills are practically all the same.

Mr. McCUTCHEON.—Are they offered for the purpose of showing that the coal actually weighed more than the invoice weight? [565—509]

Mr. ROCHE.—I simply want to show the circumstances under which the coal was discharged and to explain the difference between the out-turn weight and the bill of lading or invoice weight in those instances where the out-turn weight shows an overage. I will just hand to the jury a few of these bills. They are all the same so far as actual weight is concerned.

I would like to explain to the jury, in connection with these bills, and I suppose you will agree that this explanation is correct, Mr. McCutchen, and this was testified to the other day, that the typewriting would indicate the bill of lading or invoice weight; the red ink figures show the out-turn weight, that is, the custom-house weight at this point, the port of discharge; the matter to which we desire to particularly direct the jury's attention is the typewriting at the bottom of the bill, the actual weight of the cargo, giving the figures. (The document was here marked "U. S. Exhibit 134.")

(At this point Mr. Norcross testified, in response

(Testimony of W. H. Tidwell.)

to inquiries by a juror, that the writing at the bottom of the bill was placed thereon at the same time that the bill was made. In other words, when the bill was received in the San Francisco office of the Western Fuel Company, it contained all the typewriting now appearing on its face.)

This table, U. S. Exhibit No. 134, shows in the first column the date appearing upon the bill, which would be about the time, I think, that the vessel left Nanaimo; in the second column, the name of the vessel; in the third column, the actual weight of the coal as indicated upon the face of the bill, which column is entitled "Actual Weight at Mines," and shows [566—510] the weight which is set forth in typewriting at the bottom of the bill. In the next column, the invoice weight as certified to before the American Consular office at Nanaimo, and upon which entry was made into this port, the invoice weight, of course, being the same as the bill of lading weight; in the next column, the ascertained weight or the custom-house weight, on which duty was paid, this appearing under the designation "Ascertainied Weights"; in the next column, which is entitled "Shortage," the difference between the ascertained weight and what is here designated as the actual weight; in the next column, to the right, an overage, wherever it appears, and there are, I think, only five or six of them; in the last column, which is entitled, "Excess of Actual Weight over Invoice Weight," the difference between the invoice weight and what is designated upon those billheads. The totals indi-

(Testimony of W. H. Tidwell.)

cated in this table relate to the various sheets upon which the figures appear, and do not relate to the years.

(Mr. Roche here states that he will read the grand total, instead of the total of each sheet.)

The bills, so far as my investigation served me, showed what was the actual weight of the cargo in the month of October, 1908. That is the first time anything of that kind appeared on these billheads, so far as I know. There are one or two statements there in 1907 which were introduced here in evidence the other day; the actual weight in those instances was set forth on a letter-head instead of on the bill. Those one or two instances do not appear on this sheet. The table was carried down to and including the 24th of December, 1912, which was the last importation of Nanaimo coal for that month of which I have been able to find record. According to the tables to which my attention has just been called, the actual weight at the mines of the cargo is indicated by the figures 466,350 tons. [567—511] The invoice weight is 459,767 tons. The ascertained weight of all these cargoes, discharged at all ports in the State of California, is 466,069 tons, 795 pounds. The difference between the ascertained or custom-house weight and what is designated upon these billheads as the actual weight is 10,365 tons, 2205 pounds, and that represents a shortage, with the exception of the overages which appear, and which have to be subtracted. From this 10,365 tons 2205 pounds, we subtract, therefore, 85 tons, 760 pounds,

(Testimony of W. H. Tidwell.)

indicating said overages. The difference between this weight indicated upon the billheads as actual weight and the invoice weight is 6583 tons. The net shortage according to these figures, and after making allowance for the overage, would be 10,280 tons, 1445 pounds. The percentage of shortage on the basis of actual weight is 2.2 per cent; and the percentage of shortage upon the invoice weight, .8 of one per cent.

(The table is here introduced in evidence, no objection being interposed by the defendants, and is marked "U. S. Exhibit No. 135," and is in words and figures as follows:) [568—512]

[United States Exhibit No. 135.]

#1

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight Tons	Short Tons Lbs.	Over Tons Lbs.	Actual Weight Over Tons	Invoice Weight Tons
1908	Tordenskjold	5822	5647	5749	560	72	1680	175
Oct. 9/26	Titania	5872	5696	5725	890	146	1350	176
Nov. 10/13	Thor	7281	7063	7241	1580	39	660	218
Dec. 11/23	Tordenskjold	5952	5773	5706	1040	245	1200	179
1909	Titania	5943	5765	5776	757	166	1483	178
Jan. 12/24	"	5863	5687	5692	1040	170	1200	176
Feb. 1/26	Thor	7312	7093	7158	1440	153	800	219
Feb. 12	"	7307	7088	7244	1690	62	550	219
Mar. 13	Wellington	2354	2284	2348	800	5	1440	70
Mar. 21	Thor	7332	7112	7207	1680	34	560	220
Apr. 8	Titania	5886	5710	5775	1250	110	990	176
Apr. 22	Thor	7422	7200	7323	2120	98	120	222
May 15	Wellington	2376	2305	2382	2000		6	2000
June 5/26	Thor	7332	7112	7291	630	40	1610	71
June 5	Titania	5999	5819	5810	1250	188	990	220
June 17	Thor	7387	7165	7171	460	215	1780	180
July 6/26	Wellington	2394	2322	2329	1420	64	820	222
July 6/30	Titania	5899	5840	5704	20	194	2220	72
July 15	"	5961	5901	5725	1680	235	560	59
Aug. 19	Wellington	2363	2339	2311	100	51	2140	60
Sept. 18	Titania	(5367	5314	5358	2090	8	150	24
Oct. 9/17		(475	470	449	1600	25	640	53
Oct. 5	Wellington	2353	2329	2320	1330	32	910	5
Oct. 11	Thor	7399	7325	7289	470	109	1770	24
		129651	126359	127185	1017	2472	983	3292

#2

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight Tons	Short Tons		Over Tons	Weight Tons	Excess of Actual Weight Over Invoice Weight Tons.
					Lbs.	Lbs.			
1909									
Nov. 11/5	Thor	7291	7218	7135	630	155	1610	73	
" 11/18	Leelanaw	2826	2798	2611	1530	214	710	28	
Dec. 12/3	Thor	7388	7314	7169	1030	218	1210	74	
1910									
Feb. 1/29	Thor	7290	7217	7157	1750	132	490	73	
Apr. 3/26	Thode Fagelund	(5869 896	5810 888	5687 827	230) 510)	250	1500	59	
May 4/30	Thor	7366	7233	7224	2120	141	120	73	
" 5/7	Leelanaw	2793	2765	2742	230	50	2010	28	
June 5/30	Thor	7422	7348	7204	1910	217	330	74	
July 7/3	Jethou	6940	6671	6715	1291	224	949	69	
" 7/17	Thor	7433	7359	7242	1610	190	630	74	
Aug. 8/5	Thor	7458	7384	7260	710	197	1530	74	
Sept. 9/20	Thor	7276	7203	7275	940	1300	73		
Oct. 10/21	Falls of Orehy	6908	6839	6686	1810	221	430	69	
" 10/8	Leelanaw	2786	2759	2681	1050	104	1190	27	
Nov. 10/27	"	2826	2798	2854	470			28	
Dec. 18	"	(7011	6941	6911	1700)	101	540	70	
" "	Thor	(206	204	204)			2	
" 4	Caszo	5884	5825	5657	1860	226	380	59	
1911	M. S. Dollar	6036	5976	6011	1796	24	444	60	
" 21	Thor	(7316 (...)	7154 89	7101 89	1140))	125	1100	73	
		117221	116053	114452	1917	2796	793	28	470
									1168

Date	Vessel	Actual Weight at Mines Tons	Invoice Weight Tons	Ascertained Weight Tons	Short Lbs.		Over Tons	Invoice Weight Tons	#3. Excess of Actual Weight Over Invoice Weight Tons
					Tons	Lbs.			
1911									
Feb. 11	Thor	7266	7193	7200	930	65	1310	73	
" 20	Tordenskjold	(5204	5146	4918	1299	285	941)	58	
		(583	583	557	530	25	1710)		
Mar. 2	Thor	7266	7193	7056	1010	299	1230	73	
" 15	Saint Ronald	(5767	5461	5170	1970)				
		(488	248	248	650	348	270	58	
Apr. 7	Henley	5008	4958	4824	183	270	58	50	
" 14	Titania	(5378	5325	5216	460	161	1590		
		(253	250	250	250	3	1780)		
" 26	(May Von.) Thor	7381	7307	7309	1670	71	570	56	
May 18	Thor	7386	7312	7215	620	170	1620	74	
June 4	"	7436	7362	7279	2150	156	90	74	
" 17	St. George	1455	1441	1451	790	3	1450	74	
" 19	Longdale	(2253	2231	2196	1510	56	730	26	
		(383	379	379	6423	50	176		
" 21	Thor	7434	7360	7222	840	211	1400	74	
July 7	Boveric	6600	6534	6404	1330	247	2190	66	
" 16	Coulsden	(6288	6225	6040	960	910)		67	
		(377	373	373	1110	58	1130)		
Aug. 4	Damara	(7054	6984	6995	1110	58	1130)	76	
" 11	Tricolor	(536	530	530	1110	6	1130)		
" 21	Candidate	(3916	3877	3752	1410	163	830)	53	
		(544	530	531	1960	12	280)		
		(2588	2562	2449	960	138	1280)		
		(510	505	483	1270	26	970)		
								31	
		98866	97869	96076	119	2789	2121		997

Date	Vessel	Actual Weight at Mines Tons	Invoiced Weight Ton s Tons	Ascertained Weight Tons	Short Tons	Lbs.	Over Tons. Lbs.	Weight Over Invoice Tons. Lbs. Tons. Tons.	#4.
1911									
Aug. 27, (Sept. Vou.)	Thor	3357	3323	3304	1010	52	1230	34	
Sept. 9,	Senator	5149	5098	5021	2000	127	240	51	
Oct. 7,	Bannockburn	7520	7445	7365	2170	154	70	75	
" 28, (Nov. Vou.)	Thor	(7291	6499	6552	1410)				
Dec. 2,	Mathilda	6397	6335	6229	719	19	830	73	
1912									
Feb. 9,	Thor	7165	7093	7029	790	135	1450	72	
" 16,	Wellington	2377	2353	2179	440	205	1800	24	
" 27, (Mar. Vou.)	Thor	7169	7097	7106	1600	62	640	72	
Mar. 18,	Wellington	2318	2295	2313	490	4	1750	23	
" 31, (Apr. Vou.)	"	2266	2243	2244	1730	21	510	23	
Apr. 5,	Thor	7234	7162	7105	1660	128	580	72	
" 12,	Wellington	2355	2331	2329	990	25	1250	24	
" 25,	Ikala	6635	6569	6549	320	85	1920	66	
May 8,	Wellington	2383	2359	2326	1970	56	270	24	
" 18,	"	2459	2434	2329	1720	129	520	25	
June 11,	"	2359	2415	2306	1270	52	970	56	
May 30, (June Vou.)	"	2369	2345	2310	2170	58	70	24	
June 26, (July Vou.)	"	2395	2371	2348	2150	46	90	24	
July 7,	"	2439	2415	2348	2090	90	150	24	
" 12,	Thor	7252	7180	7107	710	144	1530	72	
" 18,	Wellington	2396	2372	2342	470	53	1770	24	
Aug. 20,	"	2379	2355	2360	210	18	2030	24	
Sept. 10,	Ikalis	6495	6430	6197	130	297	2110	65	
		100159	99238	98021	1250	2137	990	921	921

#5

Date	Vessel	Actual Weight at Mines	Invoice Weight Tons	Ascertained Weight Tons	Short Tons	Short Lbs.	Over Tons.	Over Lbs.	Excess of Actual Weight Over Invoice Weight
Sept. 19	Wellington	2327	2304	2317	1240	9	1000		
Oct. 5	"	2249	2227	2297	1210			48	1210
" 26	"	2269	2246	2264	1530	4	710		22
Nov. 17	Queen Elizabeth	6835	6767	6718	642	116	1598		
" 23	Wellington	2271	2248	2246	1850	24	390		68
Dec. 6	"	2251	2228	2252	1560			1	1560
" 24	"	2251	2228	2235	1900	15	340		23
		20453	20248	20333	972	169	1798	50	530
									205

SUMMARY
**SHOWING COMPARISON OF ACTUAL WEIGHTS AT MINES, INVOICE WEIGHTS AND ASCERTAINED WEIGHTS,
 ON CARGOES OF COAL RECEIVED BY WESTERN FUEL CO., FROM NANAIMO, B. CO.,
 FROM SEPTEMBER 26, 1908, TO DECEMBER 31st, 1912, INCLUSIVE.**

Actual Weight at Mines	Invoice Weight	Ascertained Weight		Short Tons	Lbs.	Over Tons.	Lbs.	Excess of Actual Weight Over Invoice Weight
		Tons	Lbs.					
Sheet No. 1		129651	126359	127185	1017	2472	983	6
" No. 2		117221	116053	114452	1917	2796	793	2000
" No. 3		98866	97869	96076	119	2789	2121	470
" No. 4		100159	99238	98021	1250	2137	990	...
" No. 5		20453	20248	20333	972	169	1798	50
		466350	459767	456069	795	10365	2205	85
								760
								6583

Total NET Shortage of Actual Weight=10280/1445 Tons

Percentage of Shortage, on basis of Actual Weight=2.2%

" " " " " Invoice " " = 8%

Difference between Actual Weights and Invoice Weights=6583 Tons
 [574—518]

(Testimony of W. H. Tidwell.)

(The prosecution here states, in answer to a question of the Court, that it is claimed to be the fact that all bills covering the consignments of coal from October, 1908, showed on their face the matters hereinabove, next preceding this exhibit, discussed.)

In a great majority of cases it is a fact that instead of their being an overage in those instances in which the out-turn weight would exceed the bill of lading weight, there would, if you took the figures upon the billheads as being actual weight, be a shortage.

(Subject to correction, it was at this point admitted by counsel for the defendants that a document handed them by counsel for the prosecution contains extracts from what was known as the "Donation Account," appearing in the ledgers of the Western Fuel Company. The document was headed "Extracts from Donation Account."

Conceded also by counsel for the defendants that the figures in all instances represent the money value of the coal. The document was read to the jury by counsel for the prosecution, and was in words and figures as follows:)

[United States Exhibit No. 136—Extracts from
Donation Account.]

EXTRACTS FROM DONATION ACCOUNTS.
“1906.

April	5.	Capt. Anderson	\$18.46
	6.	R. M. Gomez.....	8.00
May	11.	Chief Allen	7.14
June	8.	J. W. Hauxhurst.....	14.06
July	14.	P. McCarthy	8.00
Sept.	8.	Capt. Wilson	10.18
	15.	Mr. Hauxhurst	16.00
Oct.	31.	C. Gomez	8.00
Nov.	28.	P. McCarthy	8.00
Dec.	8.	Capt. Wilson	16.15

1907.

Jan.	18.	Chief Allen	8.00
	30.	W. Chisholm	8.00

[575—519]

Feb.	28.	F. Gomez	\$ 4.00
March	29.	D. Finnegan	8.00
	30.	A. Chisholm	8.00
April	5.	Capt. Anderson	16.00
	16.	E. Farmer	8.00
	26.	Capt. Wilson	16.00
June	30.	Chief Allen	8.00
Aug.	24.	Chief Allen	8.00
Oct.	28.	Capt. Wilson	13.71
Nov.	5.	Chief Allen	8.
	27.	Chisholm	16.00

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Dec.	14.	P. F. McCarthy	8.00
	1908.		
Jan.	11.	Chief Allen	8.00
Feb.	1.	Capt. Wilson	13.57
Apr.	18.	Chief Allen	8.00
May	2.	Capt. Wilson	14.32
	13.	P. H. McCarthy	8.00
July	22.	P. H. McCarthy	8.00
Aug.	31.	P. H. McCarthy	8.00
Oct.	31.	Capt. Wilson	15.71
Dec.	31.	Chief Allen	8.00
1909.			
Jan.	31.	C. Chisholm	16.00
		P. F. McCarthy	8.00
May	4.	Capt. Wilson	17.84
Oct.	31.	W. Chisholm	16.00
		Capt. Wilson	16.43
Nov.	11.	A. H. Freund	9.50
	" "	"	9.50
	30.	P. F. McCarthy	8.00
[576—520]			
Dec.	31.	A. W. Freund	9.50
1910.			
Feb.	28.	Capt. Wilson	9.70
Mar.	24.	M. Chisholm	8.00
		P. McCarthy	8.00
July	13.	P. A. McCarthy	8.00
Aug.	13.	B. A. Harnett	20.00
		Capt. Wilson	15.82
Oct.	19.	P. H. McCarthy	8.00

(Testimony of W. H. Tidwell.)

	15.	Capt. Lewis	10.00
	22.	—— Roundy	7.10
Dec.	31.	Capt. Wilson	16.43
1911.			
Jan.	10.	P. M. McCarthy	8.00
Mar.	18.	P. H. McCarthy	8.00
Apr.	30.	Capt. Wilson	14.96
Sept.	14.	P. F. McCarthy	8.00
Nov.	8.	J. Crichton	24.00
Dec.	22.	Major Grant	30.00
1912.			
Jan.	4.	P. H. McCarthy	8.00
Mar.	4.	Major Grant	24.00
May	31.	P. F. McCarthy	8.00
		W. J. Hardy	16.00
June	25.	Capt. Lewis	20.00
Aug.	31.	J. B. Twigg	9.50
Oct.	31.	A. H. Freund	4.75
Nov.	30.	P. F. McCarthy	8.00
1913.			
Jan.	31.	J. Twigg	4.75
		P. H. McCarthy	8.00

[577—521]

Referring to certain names in this list, the customs service has an assistant weigher by the name of D. Finnigan. There is an H. E. Farmer, who was chief clerk in the collector's office of the custom-house when Collector Stratton was there.

(Mr. Roche here made the following statement:
“P. H. McCarthy is the person referred to by Mr.

(Testimony of W. H. Tidwell.)

Chisholm yesterday as the individual connected with the treasurer's office of the Pacific Mail. I want to make that statement so there will not be any confusion about the name.”)

A. H. Freund is an assistant weigher at the present time. I only know Harnett by hearsay, as connected with the Toyo Kisen Kaisha. Roundy was an assistant weigher, but he is now dead. Crichton is connected with the Toyo Kisen Kaisha. Major Grant was formerly assistant to Major Young, of the army transport service. Twigg is an assistant weigher at the present time, or is an acting deputy collector, assigned to the subport of Oakland. I have examined this donation account. My recollection is that in this memorandum, from which this is copied, I set forth the name of Mr. Chisholm in every instance in which it appears. I was present at the time Mr. Chisholm testified here the other day. My recollection is that his name did not appear in the book any more frequently than it appears in this statement, notwithstanding his testimony.

(The above copy of an extract from the donation account was here marked “U. S. Exhibit No. 136.”)

(At this point the jury was excused while counsel argued before the Court the admissibility of any evidence of alleged donations by the Western Fuel Company or its [578—522] officers to engineers of the Toyo Kisen Kaisha—Japanese Steamship Company.)

On further investigation of my records I find that the date on which I advised the collector of the port

(Testimony of W. H. Tidwell.)

to refuse to permit the officers of the Western Fuel Company to examine certain records located at the custom-house was July 24th instead of, as I have previously testified, June 24th. A certain disagreement that I had with Collector Stratton fixes the date in my mind. If Mr. Sullivan and Mr. Roche were appointed special prosecutors in this case early in July, then said above mentioned refusal occurred after said appointment.

Q. Now, your attention was directed yesterday afternoon by Mr. McCutchen, to several entries contained in Exhibit "C" concerning which you have already testified and which upon cross-examination after a comparison having been made between Mr. Mills' books and Table C, you said that while the overages were correct the percentages were not correct. Now, you are familiar, are you, with the entry appearing upon page 2 of Table C, referring to the barge "Theobold." A. On page 2?

Q. Page 2, yes, under date of January, 1906.

Mr. McCUTCHEN.—January 31st?

A. Yes, January 31st, the "Theobold" appears.

Mr. ROCHE.—Q. According to your table, how many tons were checked into that barge, and how many tons discharged from the barge?

A. 1,524 tons, 1,580 lbs. were checked into the barge and 1,668 tons, 1,606 lbs. checked out of the barge, 144 tons, 26 lbs. more [579—523] than was checked into her.

Q. That overage would be approximately what percentage of the entire coal laden or checked into the

(Testimony of W. H. Tidwell.)

barge, just approximately? A. About 9.

Q. About 9 per cent? A. Yes.

Q. Now, is there any inaccuracy either so far as tonnage is concerned or percentage in that tabulation as compared with the books of the defendant Mills?

A. The first coal which he appears to have received is on January 17th, 827 tons, 870 lbs., the coal being received from the steamer "Tellus."

(The witness here traced receipts and discharges of coal on said barge "Theobold" from January 19th to January 21st, showing an overage of 144 tons and 26 pounds.

Counsel for the prosecution at this point gave to counsel for the defendants references to five other entries in the Mills' diaries, where the tonnage and percentage of overage agreed with the tabulation in Table C.

The attention of the witness was here directed to the statement compiled by him and hereinbefore referred to, being a list of alleged donations by the Western Fuel Company, made by the witness from certain vouchers in the possession of that company.)

Directing my attention to the month of December, 1907, I would say that I did find a voucher of that date showing "Custom Weigher del. coal \$13." No other explanation is found. [580—524] The name of the weigher did not appear upon the voucher. Under date of January, 1908, there is an item on the list or statement amounting to \$107. The voucher corresponding thereto discloses Christmas donations

(Testimony of W. H. Tidwell.)

to the mail dock. There is no other explanation. The amount of the voucher is \$150. During the month of December, 1908, there is a voucher for Pacific Mail donations, Chisholm, \$70; Wilson, \$25; Parks, \$20; Blake, \$10; and Dunn, \$20. It is my understanding that the Parks referred to there was the chief weigher of the Pacific Mail Steamship Company. There were certain vouchers examined by me and included in this list or statement which I have compiled which do not disclose upon their face the purpose for which the money was expended; that is, for instance, there are vouchers in which amounts are charged to gross earnings and rebates, without any other explanation. Under date of August, 1909, there is an item which reads, "Commandante Mare Island Navy Yard, \$50." There is no tag or voucher. There is another item under date of March, 1910, which reads, "Commandante Mare Island Navy Yard, \$100," which appears in one of the accounts. In the month of April I found a voucher or statement entitled, "Special Expense Auth., by J. B. S., Signed by D. E. N., \$100." I think the D. E. N. applies to Mr. Norcross, secretary of the Western Fuel Company, and I presume the J. B. S. applies to Mr. J. B. Smith, the general manager. There are other accounts or vouchers, entitled, "Donations charged to general expense."

(It was at this point admitted by counsel for the defendants that the Pacific Mail Steamship Company paid the Western Fuel Company the price charged by the latter for coal supplied to the former

(Testimony of W. H. Tidwell.)

upon [581—525] the weights of the coal as checked out of the barges. In other words, it was admitted that the Pacific Mail Steamship Company paid for the coal on the custom-house weights.

Referring to steamers generally, apart from the Pacific Mail steamers, it was also admitted that a bill was rendered after coal was delivered by a barge to a steamer in the bay, the bill being based upon the weights of coal taken as the coal was delivered over the side of the barge into the ship.

Admitted also by counsel for the defendants that in so far as steamship companies are concerned, who present draw back claims against the United States, they paid upon the out-turn weight, which, of course, was the custom-house weight.)

Further Recross-examination by Mr. McCUTCHEN
and Mr. MOORE.

I think there are some donations to charities in the donation account; that is, the donation account generally apart from the list which I have prepared. Whether the majority in amount of money shown to have been donated was donated to charitable organizations, or not, I don't know, because I did not foot up the entire account and deduct from it the amount which appeared to have been donated to charities. It is true that the names are stated in full of various charitable institutions. I cannot even say whether a large proportion of the names on the donation account are the names of [582—526] charitable institutions. There are a number of such institutions in the donation account. There are people in that

(Testimony of W. H. Tidwell.)

account who are neither employees of the Pacific Mail nor of the Government nor of any body else. There are names of individuals as well as of institutions.

I cannot say how long it was before July 24th, being the date upon which I requested the collector of the port to deny to the Western Fuel Company access to the custom-house records, that I met Mr. Olney in the hall of the custom-house, and went with him to the office of the surveyor of the port, I do not recall whether it is a fact that it was during the administration of John L. McNab, as United States District Attorney. I do not recall any document that I had asked for from the Western Fuel Company and been refused at the time of that meeting with Mr. Olney, except the one document which I recited yesterday in which the matter was finally taken up with Mr. Olney. Mr. Olney was then asking to see the records. I do not know whether the matter was said by the surveyor of port to be in my hands and in those of Mr. McNab's. The surveyor of the port at the time was Mr. McKinlay.

Q. In response to questions put to you yesterday by Mr. Roche, Mr. Tidwell, you testified that the total of the barge overrun so far as tonnage was concerned, remained unaffected by the discoveries of these inaccuracies in Mr. Mills' books, did you not?

A. I think that was in reply to a question of Mr. Olney, if I remember correctly, but later we found where there was a difference, there might be some difference and there might not; at the present time I

(Testimony of W. H. Tidwell.)

would be unable to say without going over every item.

[583—527]

Q. Well, at the present time you find yourself unable to answer definitely with respect to that?

A. Yes, but my opinion is, if I may express that, that there would be little change, if any.

Q. There would be little change, if any, so far as the total of the overrun was concerned as measured in tons; is that correct? A. Yes, sir.

Q. The only change that would take place would be with respect to the quantity of coal which was laden into the barge, according to your present opinion; is that correct?

A. That appears to be true.

Q. So that the matter would be one of reduction of percentage of the overrun rather than a reduction of the overrun as measured in tons? A. Yes, sir.

Q. Now, then, the fact of the matter is, is it not, Mr. Tidwell, that it don't make much difference what Mr. Mills credits those barges as having received so far as the question of these overages is concerned?

A. I don't exactly catch the meaning of your question.

Q. Well, I will put it this way: In getting the overrun, the grand total overrun, you take, do you not, the total quantity of coal sold by the Western Fuel Company from April 1st, 1906, to December 31, 1912, together with the amount on hand at that date, and which approximates 2,200,000 tons, do you not; you take that as one of your figures? A. For what?

Q. To get your total of overrun?

(Testimony of W. H. Tidwell.)

A. Of the barges?

Q. No, the whole business. A. Yes, sir.

Q. Now, then, from that 2,200,000, representing the total [584—528] sales during that period, with the amount on hand at the end of it, you subtract the custom-house weights, do you not?

A. Yes, the custom-house weights, and on the amount on hand on April 1st, 1906.

Q. You subtract the custom-house weights and the amount on hand on April 1st, 1906, and you get in the neighborhood of 62,000 tons, do you not?

A. Yes, sir.

Q. Now, when I say you subtract the custom-house weights from that 2,200,000 tons, I am not referring to the custom-house weights of coal delivered out of the barges while the barges are coaling vessels; you understand that, do you not? Do you follow me there, Mr. Tidwell?

A. No, I don't believe I do, Mr. Moore. I would like to have the question read. (Question repeated by the reporter.) I still don't understand the question.

Q. This is the proposition; probably I did not make myself clear; I will try and put it in a different way. The grand total overage you say you obtained by subtracting from the total of sales the amount on hand; that is to say, from 2,200,000 tons, you subtract the custom-house weights and the amount on hand on April 1st, 1906, do you not? A. That is true.

Q. And thereby you arrive at a difference of approximately 62,000 tons, as I understand you?

(Testimony of W. H. Tidwell.)

A. That is correct.

Q. The custom-house weights you subtract, together with the amount on hand on April 1st, 1906, or the incoming weights on the imported coal; that is, the out-turn weight of vessels importing coal here; is not that correct?

A. And on which duty was paid. [585—529]

Q. And the custom-house weights that you have reference to are the weights that are made by the custom-house weighers on the arrival of the coal upon its importation, are they not? A. Yes.

* * * * *

Mr. STANLEY MOORE.—Q. When you make that subtraction, Mr. Tidwell, what have you got, adding together the amount on hand on April 1st, 1906, and the custom-house weights from April 1st, 1906, to December 31, 1912, what is the particular sum that you get by that computation?

A. Approximately 62,000 tons.

Q. No, no, I am speaking now of the sum total of the amount on hand April 1, 1906, which you testified to according to the books of the company was about 25,000 tons, added to these custom-house weights throughout that period from April 1st, 1906, to December 31, 1912?

A. Oh, I think I understand you now; you mean the amount on hand subtracted from the amount received between those dates; is that what you mean?

Q. It ought to be added to the amount received.

A. I understood you to say the difference between them.

(Testimony of W. H. Tidwell.)

Mr. ROCHE.—Counsel is trying to find out not the difference between but the total received plus the coal on hand April 1, 1906.

A. That is shown by Exhibit "A."

Mr. STANLEY MOORE.—Q. And you got it in the neighborhood of 2,140,000 and some odd tons, did you not?

A. 2,138,000 and something, I think it was.

Q. Very well, 2,138,000 tons.

A. I think that is approximately correct.

Q. There were 25,000 tons on hand April 1, 1906, and therefore [586—530] this difference of 2,138,000 tons less 25,000 tons represents the out-turn weight of the coal upon its importation here, does it not,—the out-turn custom-house weights?

A. Since that date, since April 1st, 1906.

Q. And it is made up in large part at least of the out-turn custom-house weight as represented and registered by the scales upon the Folsom Street bunkers, to which place, according to your testimony a large proportion at least of this coal was landed; that is correct, is it not? A. That is correct.

Q. That 62,00 tons gives you the overage, does it not irrespective of the amounts that Mr. Mills may or may not have charged as having been loaded into the barges?

A. That represents the difference between the total receipts and the total sales without taking into consideration the books of Mr. Mills.

Mr. ROCHE.—We concede that.

Mr. STANLEY MOORE.—Well, never mind, Mr.

(Testimony of W. H. Tidwell.)

Roche, we want the witness to concede it, too.

Q. That figure is interdependent so to speak, has no reference to the amount that Mr. Mills says—I mean it is independent,—that figure of 62,000 tons is independent of any amount or amounts that Mr. Mills notes down as having been received into the barges, is it not?

A. I don't know that I fully grasp your question, Mr. Moore. It is rather difficult. It is not absolutely independent for the reason that this barge overage is simply a part of that 62,000 tons overage.

* * * * *

Q. Is not this the fact, and is it not appreciated by you, that the overage is obtained—the total overage is obtained— [587—531] by subtracting from the amount of coal on hand and received according to the custom-house weights on importation here, by subtracting that amount from the total sales during the same period, taking into consideration in addition the coal on hand at the end of that period?

* * * * *

A. That is true. I have answered it several times, not only to-day but before.

Q. Would it make any difference so far as that overage is concerned, the 62,000 tons total overage, whether Mr. Mills had made any entries respecting the quantities of coal that were purported to be loaded into the barges?

A. Well, previous to answering the question, Mr. Moore, I would like to ask you whether—

Q. (Intg.) Can't you answer that yes or no, Mr.

(Testimony of W. H. Tidwell.)

Tidwell and then make your explanation?

A. No, I would prefer to ask a question about it first. You say independent. Do you mean by that if the coal which was laden on the barges had not been disposed of in any manner whatever but had remained in the property of the company?

Q. Certainly not. I am talking about the quantities of coal tht Mr. Mills put down—that he put down or did not put down as being loaded into the barges. I am trying to develop the immateriality of the figures as to what went into the barges.

A. Well, as to the amount received and the amount sold, the aggregate amount received and the aggregate amount sold—is that it?

Q. I am trying to develop, Mr. Tidwell, if I can make it clear, that it does not make any difference what went—

A. (Intg.) And I asked the question there only for information, Mr. Moore. [588—532]

Q. Well, what is the question?

A. I asked you did you mean the aggregate amount received and the aggregate amount sold?

Q. Of course, Mr. Tidwell, I am talking about the amount received. There was coal sold out of the barges. Or to get at it this way, I will ask you—

A. (Intg.) I think I could answer it if you would answer my question first.

Q. Well, I am talking, Mr. Tidwell, about the amount received into the barge, whether it makes any difference whether Mr. Mills put that down at all, or not, or what his figures are, so far as the

(Testimony of W. H. Tidwell.)

amount that he says was laden into the barges, or which those books purport to state were laden into the barges is concerned.

A. Those figures have absolutely nothing to do with the difference obtained between the amount sold and the amount received, they have no connection whatever with those particular figures, but the 33,000 tons overage which is shown by those books, or 43,000 tons overage, which is shown by the two receipts, evidently a part of that 62,00 tons—we can increase that now to 72,000 tons, because there are 10,000 tons back in 1904 and 1905, making a total of 72,000 tons.

Q. Mr. Tidwell, I was not talking about that; that is, assuming that Mr. Mills did put down and that he accurately put down all of the coal that went into the barges. I am talking now not about the barge overrun as it may purport to be represented accurately or inaccurately by the incoming weights in the Mills' books—

A. (Intg.) I did not refer to the accuracy or the inaccuracy of it. [589—533]

Q. No, I understand that, Mr. Tidwell, but I am talking about the total overrun in the business of this company, and I ask you again, is that affected in any way or dependent in any manner upon what Mills wrote down as going into those barges, or upon the fact as to whether he wrote down anything in that regard as having been laden into the barges?

Q. If the coal were sold, it is absolutely independent of it.

Q. If the coal were sold there is no occasion or

(Testimony of W. H. Tidwell.)

necessity so far as figuring the overrun is concerned for Mr. Mills to have written down anything as being the amount of coal which went into those barges?

A. Mr. Mills' books represent part of the sales of coal, show part of the sales of coal and the vessels to which the coal was delivered.

Q. Yes, but I am talking about a part of Mr. Mills' books which—

A. (Intg.) I don't think, Mr. Moore, we can entirely divorce Mr. Mills' books from the sale of coal, because they are a part of it.

Q. We will get at it this way: Just imagine for a moment that you never have laid eyes on Mr. Mills' books, that you never have seen them; could you not have figured out and would you not have figured out the total overrun of coal in the business of this company as being 62,000 tons without ever having seen or referred to Mr. Mills' books?

A. There is no question about that at all, because that overrun was not considered in taking the two amounts, the amounts sold and the amount received.

Q. And that overrun on the whole of the business done by the company, including sales in every direction, those as to which [590—534] deliveries were made to the sides of vessels through the barges, those as to which deliveries were made by being loaded upon coal wagons in this city and those as to which deliveries were made by the railroad trains, is 2.8 per cent only in excess of the out-turn custom-house weights upon the importation of the coal; is not that the fact?

(Testimony of W. H. Tidwell.)

A. That is approximately correct.

Q. Now, Mr. Tidwell, coming to your barge over-run—

A. (Intg.) Just one moment, Mr. Moore; that amount, you will understand, does not apply to the vessels where there was a difference in tonnage; for instance, where there was a short and over, but that is the total amount of coal received to the total amount of coal sold; in many, many instances in this record the invoice weights and the out-turn weights are exactly the same; the largest one item that I remember is a purchase from the Central Coal Company of some 18,000 tons; it appears on the record as invoice weight, 18,000 odd tons—I don't remember the exact figure—and the same amount appearing under the ascertained weight or the out-turn weight. Consequently the percentage is lowered in that manner.

Q. Now, you state, Mr. Tidwell, that there are many, many instances of that kind, but you have never furnished us with any table at least, or introduced any table in connection with your evidence here which does show the number of instances of that kind? A. It is shown in Table A.

Q. You say it is shown in Table A?

A. Yes, sir.

Q. You mean it is shown in Table A if a man goes over the whole of that table and segregates those instances? A. Yes, sir.

Q. Have you done that? A. No.

Q. You don't know how many those instances are,

(Testimony of W. H. Tidwell.)

as a matter of [591—535] fact, do you?

A. Wait a moment—yes, I believe there is something in evidence to that effect, I think there is.

Q. What table is that?

A. I don't know the exhibit, but I think it is in evidence.

* * * * *

Q. What proportion is shown in that table of cargoes of that kind?

A. I don't recall at the present time. I think the evidence will show it there. I recall counting up the overs and the shorts during this period and I think there were 324 shorts and 120 overs; the percentage of shorts I think was 72, and the overs 28.

Q. And when you got your difference between the invoice weights and the custom-house weights your final difference was arrived at by adding up the extent of the overs—those cargoes that had run over the invoice weight, making a total out of that and then adding up the extent of the shorts and making a total out of that and then subtracting the overs from the shorts which gave you a new figure of 20,700 tons; is not that right?

A. That is approximately correct.

Q. And that 20,700 tons represented on the invoice weights a shortage of nine-tenths of one per cent, did it not?

A. That is the total amount received, but not on the cargoes on which there was a difference.

Q. Not on the cargoes you mean where part of it was consigned to the Western Fuel Company?

(Testimony of W. H. Tidwell.)

A. No, I don't mean that at all; I mean where there was a short or an over.

Q. Yes; that was the result that you got where you took into [592—536] consideration both cargoes that were short and cargoes that were over, was it not?

A. No, sir; in other words I have figured—

Q. (Intg.) Are you clear on that, Mr. Tidwell?

A. Yes, I am clear on it. Your nine-tenths of one per cent is the percentage of the total amount received, 2,138,000, to 20,700.

Mr. ROCHE.—Which included the partial cargoes?

The WITNESS.—Yes, which includes the partial cargoes; whereas, the percentage of cargoes where there was a difference, say 144 cargoes, I think that is the number, it will be materially changed. And I think that also is in evidence.

Mr. STANLEY MOORE.—Q. Then coming back to the nine-tenths of one per cent, Mr. Tidwell, that is the final general figure that is arrived at by taking into consideration all of the cargoes, split cargoes, cargoes as to which there is an overrun, and cargoes as to which there is a shortage, but in the instance of split cargoes figuring the invoice weight, in the instance of split cargoes not figuring any discrepancy from the invoice weight,—I say that is the final general result that you obtain, is it not, 20,700 tons?

* * * * *

Mr. STANLEY MOORE.—Q. Approximately the percentage; that is, 20,700 tons, or nine-tenths of one

(Testimony of W. H. Tidwell.)

per cent. Now, you say you took cargoes and made a table by itself, a separate table relating to shortages, did you not?

A. I think that is in evidence. That is my remembrance.

Q. What is the percentage there? You have mentioned that, Mr. Tidwell, and that is the only reason I am going into it.

A. No, I have not mentioned the percentage.

Q. Well, I will ask you to mention the percentage.

[593—537]

A. I don't just recall what it is.

Q. It is under 2 per cent, is it not?

A. I think it is.

Q. Mr. McCutchen tells me that you said it was 1.8 per cent, taking the short cargoes in a class by themselves and making a separate table with respect to them?

A. As I remember it, it is 1.84 per cent, since you have refreshed my memory on it to some extent.

Q. We will go back to the barge overrun you mentioned awhile back as being 33,000 tons.

A. That is, from 1906 to 1912.

Q. Yes; and it was during that same period that you derived this excess of 20,700 tons representing the difference between the invoice weights and the out-turn weights, is it not, the same period as you got the 33,000 tons barge overrun?

A. Yes, approximately the same period. I think the exhibit as to the barge overrun only runs up to November 20th, I think it is.

(Testimony of W. H. Tidwell.)

Q. Well, it is practically the same period.

A. It is approximately the same period.

Q. It is seven years, with the exception of a divergence of one and one-half months, or something like that? A. Yes, sir.

Q. You indicated here the other day, Mr. Tidwell, that so far as coal actually weighed was concerned that that was all right and therefore you considered that the coal that went into the offshore bunkers was correctly weighed; your theory in that regard was, or you indicated in that regard, if you meant to indicate anything, that there might be coal that went into the inshore bunkers that was not weighed at all. Did you not [594—538] intend to give some such indication as that?

A. Yes; I stated that that was my information.

* * * * *

Mr. STANLEY MOORE.—Q. Now, I will ask you this question, Mr. Tidwell; it was from the offshore bunkers that the coal was obtained in the greatest part according to your information that was laden into the barges and afterwards found its way into these vessels to be there used for fuel purposes, that coal I say came in greater part according to your information from the offshore bunkers, did it not?

A. That is my information.

Q. And you figure an overage, an actual overage, as I understand you, of 33,000 tons with respect to those barges, do you not?

* * * * *

A. Yes, sir.

(Testimony of W. H. Tidwell.)

Mr. STANLEY MOORE.—Now, Mr. Tidwell, if you take the invoice weights, and in view of the claim here or the statement of the theory made by Mr. Roche the other day that the invoice weights contain actually at least as much coal as was laden into the vessels, you testified then the company's actual overrun would be on the whole of its business 41,000 tons, did you not?

* * * * *

A. Yes, sir.

Q. Well, is it 41,000 tons?

A. Whatever the figure is; it is the difference between 2,200,000 and 2,159,000; it is approximately 41,000. As I stated before, so far as the actual overage is concerned of 62,000 tons, that was obtained from the difference between the amount sold and the amount received. The question of the treatment of receipts and sales from the barges and the overage from the barges was an entirely separate and distinct transaction.

Q. Well, then, if there was an actual overage which according to your theory there was with respect to the barge business of 33,000 tons, there was only an actual overage of 8,000 tons if the invoice weights correctly [595—539] represent the amount of coal on all the rest of the business transacted by the company during that seven years, was there not?

* * * * *

The COURT.—Well, that is a matter of subtracting 33,000 from 41,000.

Mr. STANLEY MOORE.—Yes, your Honor, but

(Testimony of W. H. Tidwell.)

I cannot get him to do it.

The COURT.—Then let us do it if he is unwilling to. The difference is 8,000.

The WITNESS.—I intended to answer it that way. I saw what he was driving at there.

Mr. STANLEY MOORE.—Q. Then you have figured up a total of sales out of the barge department of the business, if we may term it that, of about 569,000 tons, have you not, on which you derive this overage of 33,000?

A. I should say approximately that amount.

Q. But you have not, even according to Mr. Mills' books that seem to be inaccurate in themselves, credited those barges with coal that even Mills had down in his books as going into them, have you, in arriving at that figure of 569,000 tons?

A. It appears not.

Further Redirect Examination of Mr. ROCHE.

In order to reduce this general overage of 41,000 tons, it would have to be conceded that the invoice weights showing importations of coal were correct, and that the ascertained or custom-house weights were incorrect and fraudulent. [596—540]

[Testimony of Michael J. Costello, for the Government.]

MICHAEL J. COSTELLO, a witness called for the United States and sworn, testified as follows:

I live in San Francisco, and have for ten years been in the Government employ as Inspector of Customs. I was for eight years a bookkeeper before I entered the customs service, so that I am familiar

(Testimony of Michael J. Costello.)

to some extent with bookkeeping and methods thereof. I am familiar with the dock books or diaries of the defendant Mills which have been introduced in evidence in this case, and have been familiar with them for the last two or three weeks. At the request of Mr. Tidwell and of counsel for the Government, I have, within the past few days, made an examination of all those books, with other parties, for the purpose of determining in how many instances, according to those records, a shortage appeared upon the barge or barges referred to in said books at the time of clearance. I made that examination with Mr. Atkinson and Mr. Tidwell. After the examination was made the figures which were put down showing these shortages were checked for the purpose of ascertaining whether they accurately set forth the number of shortages which appeared from time to time in said books of the defendant Mills. I made a tabulation showing the instances where such shortages appeared and the amount thereof according to the Mills records. I also made a calculation showing the total quantity of coal representing the aggregate amount of shortage appearing upon those barges, according to said Mills' records, between January 1, 1904, and December 31, 1913. I am familiar with the various tables that have been introduced in evidence by the United States, including Table C, introduced in evidence as part of United States Exhibit 125. I am also familiar in a general [597—541] way with the supplementary tables covering the years 1904 and

(Testimony of Michael J. Costello.)

1905. The calculation or table which I prepared showing these shortages covers 1904 and 1905, and the period between January 1, 1906, and December 31, 1912. The document now shown me is the document which I made, and to which I refer. With the exception of one or two minor instances where Mr. Mills' figures were slightly inaccurate, and where I had to change them to strike a balance. I have, however, put upon that table both Mr. Mills' figures and the corrected figure. This document correctly sets forth every instance during the period January 1, 1904, to December 31, 1912, when a shortage would occur upon these barges at the time of clearance. The first inaccuracy which I found in the Mills' books was with reference to the barge "Energy," under date of April 17, 1906. His books show the shortage to be 8 tons, 1680 pounds, whereas in truth the figure was 8 tons, 1620 pounds. The second inaccuracy relates to the barge "Solano," under date of January 15th, 1910, Mr. Mills' shortage being 6 tons, 1388 pounds, and the correct figure being 6 tons, 1414 pounds. The total amount of coal laden upon these barges from time to time, when a shortage would appear as the result of the clearance of these barges, amounts to 14,471 tons, 677 pounds, according to the records kept by Mills and the total weight of the coal discharged from those barges according to his record, including these two corrections amounts to 14,168 tons, 1978 pounds, making the total shortage during this entire period of time from January 1, 1904, to December 31, 1912, of 282 tons,

(Testimony of Michael J. Costello.)

939 pounds. The total amount of coal laden and checked upon these barges during the period referred to amounts to 33,305 tons, 862 pounds. The total coal discharged from the barges during the same period, according to Mr. Mills' records, amount to 32,281 tons, 695 pounds, the total shortage being 524 tons, 167 pounds.

(The table prepared by the witness and above explained was here introduced in evidence as "United States Exhibit No. 137.")

(It was here agreed by counsel for the defendants that that portion of the minutes of the Western Fuel Company showing the proceedings had [598—542] during each meeting of the board of directors from January 1, 1904, to and including December 31, 1912, relating to the reading and submission of the monthly coal statements might be considered to be introduced and read in evidence, with the exception of those portions which had been already read in evidence. In answer to the question what was meant by coal statements, counsel for the prosecution stated that they desired to introduce in evidence the language used in the minutes themselves, leaving the jury to determine what they referred to.

It was also here agreed by counsel for the defendants that that portion of the minutes of the meeting of the board of directors of date March 25th, 1907, during the course of which the salaries of the president and the vice-president of the Western Fuel Company were increased to \$1500 per month, and at which meeting a dividend, No. 14, of 2½% was declared, might be considered as read.) [599—543]

[**Testimony of Harry Cooper, for the Government.**]

HARRY COOPER, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live now and have lived since about February, 1905, in Alameda, California. For about forty years prior thereto I resided at the Nanaimo coal mines. I was employed there from 1902 to 1905 with the Western Fuel Company, until two or three months before I left, in the capacity first as dock-master and ultimately as weigher. I was also at one time harbor-master for five or six years. My period of employment at Nanaimo with the Western Fuel Company ran, as I have said, from 1902 to 1905; and before 1902, in fact since 1862, I was connected with the plant which the Western Fuel Company later acquired. The company that owned the properties at Nanaimo before the Western Fuel Company came in was the Vancouver Coal Company.

I am familiar with the location of the mines at Nanaimo. They had a Fairbanks scales there. I am also familiar with the docks and the bunkers. The bunkers were located upon the docks, or rather close to the docks, on a grade lower. I don't remember clearly, but I think the scale-house was about one hundred yards away from the docks.

I was first employed by the Western Fuel Company as dock-master, but in less than a year I became master weigher, and remained in the latter capacity until a short time before I left. When I was dock-master

(Testimony of Harry Cooper.)

I frequently entered the scales-house. As master weigher I had to see all the coal weighed, and my station would be in the weigher-house. The practice was to bring the coal from the mine, weigh it and [600—544] then dump it into the bunkers. During the entire time I was employed by the Western Fuel Company I never saw a trainload or carload of coal taken from the mine and discharged into the bunkers or into a ship that was not weighed. The tare weight was painted on the sides of the car. Each car also had a separate number. Tare weights were taken frequently—I should say three or four times a year. Record was kept of the scale-house very particularly on separate papers for each ship, and for the local or other trade; of every day's output of coal, and of the weight thereof, and of the kind of coal. The weights were taken upon a rising beam. These were called fair weights. I never saw any coal dumped either into bunkers or ship which was not in fact weighed first. Sometimes there would be as many as three ships loading at a time. In such case the Western Fuel Company maintained men on the wharf who had check-books in which were entered the number of every car and the boat into which such car would be discharged. One such checker ordinarily looked after several vessels, because the three wharves were not very far apart. The check-books or records would then be returned to the office. The cars were drawn from mine to scales, and from scales to bunkers or ship, by a locomotive; but at the wharf there was a self-acting machine that pulled the cars one

(Testimony of Harry Cooper.)

by one and dumped them into the chutes. Instructions were telephoned from the office to the wharf as to what ship such and such cars should be dumped into; or sometimes the instructions would be given to the locomotive man at the scale-house. Then they would check up at the wharf, and the figures would be compared. When a vessel was actually at the wharf they would load the coal directly into her. The bunkers contained pockets; and when coal was being discharged into the bunkers, a record would be [601—545] kept of each car and of the particular pocket into which it was discharged. The weigher would have the weight of that car at the scales-house. It is not, however, a fact that the Western Fuel Company office at Nanaimo knew the exact quantity of coal contained in each pocket. There were many pockets, but they all ran into one; you could take $\frac{2}{3}$ of the coal out of any other pocket; they were not separate bunkers; there were twenty holes or pockets; twenty cars could load at a time, but it was all one bunker, but they were all dumped into separate places. When coal was taken from the bunker into a ship it was weighed again, first being taken back to the scales-house and weighed and eventually returned to the dock and the ship when it would be discharged directly from the cars on to the ship. That was the system pursued during the time I was employed by the Western Fuel Company. Invoices were frequently sent to the American consular officials for certification in order to clear the vessel, and bills of lading would be issued to be signed by the master of

(Testimony of Harry Cooper.)

the vessel. Upon those occasions the invoice weight would be filled in by one of the office clerks, and such invoice weight would represent the actual scale weight of the coal. Such weight was kept by fives and tens in pounds.

[**Testimony of W. H. Tidwell, for the Government
(Recalled—Cross-examination).]**

W. H. TIDWELL, recalled on cross-examination, testified as follows:

I stated this morning that on examining the books and vouchers of the Western Fuel Company I found vouchers drawn to the commandant at Mare Island. I placed the commandant's name in the list which was used this morning. This list is extracts from various vouchers which were found among the vouchers of the Western Fuel Company, does not say whether the vouchers represent a donation or not. I [602—546] did not know that the commandant at Mare Island is always a rear-admiral of the navy. I made the list which was presented this morning for just exactly what it represents. I did not give my testimony here for the purpose of creating the impression that the Western Fuel Company had bribed the commandant at Mare Island. The first item on this list to said commandant is \$100, of date March 12th, 1910.

(Counsel for defendants here read in evidence the following communication:)

(Testimony of W. H. Tidwell.)

“United States Navy Yard,

“Mare Island, Cal., September 9, 1910.

“Gentlemen: There is enclosed herewith San Francisco Check #94012 for \$50.09, being the balance of your Special Deposit for cost of teaming coal, as per following statement:

“Deposited Feby. 14.....	\$ 50.00
March 12.....	100.00

	150.00

“Charges, labor and material, Feby.

March, Apr., May, June.....	99.91

“Balance.....	50.09
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“Respectfully,

“C. M. RAY,

“Pay Director, U. S. N., Paymaster of the Yard.

“Western Fuel Co., 430 California St.,

“San Francisco, Calif.”

It was thereupon conceded by counsel for defendants that this correspondence was not turned over to the prosecution and that the prosecution never had it.

In August, 1909, another item of \$50 appears against the commandant at Mare Island.

(Counsel for defendants then read in evidence the following three papers:)

“United States Navy Yard.

“Mare Island, Cal.,

“Special Deposits: Western Fuel Co.

“September 2, 1910.

“Sir: Replying to your letter of August 27, I sub-

mit the following statement of your account. [603—
547]

Deposited	\$150.00
Cost of work,	
Labor	\$52.33
Tool charges.....	17.57
Indirect.....	30.01
<hr/>	
	\$99.91

Balance.....\$ 50.09

“Very respectfully,

“J. S. COLLINS,

“P. A. Paymaster, U. S. N., Accounting Officer.

“Western Fuel Company, San Francisco, Cal.”

“Navy Yard, Mare Island, California.

“Feby. 14, 1910.

“\$50.00.

“Received from the Western Fuel Company, through the Commandant, certified check No. 2319, dated Feby. 11, 1910, on the First National Bank, San Francisco, for Fifty Dollars, (\$50.00), as a special deposit to cover cost of work to be performed in hauling coal under contract No. 17, Navy Pay Office, San Francisco, from the water front to the officers’ quarters at this Yard.

“C. M. RAY,

“Pay Director, U. S. N., Paymaster of the Yard.

“J. Western Fuel Co.”

“Navy Yard, Mare Island, Calif.

“March 12, 1910.

“\$100.00

(Testimony of David G. Powers.)

"Received from the Western Fuel Co., through the Commandant, certified check No. 2427, dated March 9, 1910, drawn by the Treasurer, Western Fuel Co., on the First National Bank, San Francisco, for the sum of One Hundred Dollars, as a special deposit to cover cost of work to be performed in hauling coal under Contract No. 17, Navy Pay Office, from [604—548] the water front to the officers' quarters at this Yard.

"C. M. RAY,

"Pay Director, U. S. N., Paymaster of the Yard.

"The Western Fuel Co. R."

(Counsel for defendants, in reply to a question of the prosecution then stated that they did not know whether or not they had in their possession anything explaining any of the other items to which the witness had testified as having been on the Western Fuel Company's donation account.)

[Testimony of David G. Powers, for the Government.]

DAVID G. POWERS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I have lived in San Francisco since my birth. I was at one time employed by the Western Fuel Company, and before that by the defendant Mills by whom I was first employed on September 10, 1902. Immediately prior to that I was in school, except that I had worked for a very short time in the Risdon Iron Works. Defendant Mills had his office at Mis-

(Testimony of David G. Powers.)

sion No. 2. He also had an office on California St. at the office of the Western Fuel Company. He employed me as timekeeper for all outside steamers. Mr. Mills was at that time superintendent for the Western Fuel Company; but I worked for him personally, because, in addition to his superintendency, he was taking contracts on steamers to trim coal. I do not include in this statement steamers belonging to the Pacific Mail Steamship Company. I am referring to the vessels of the Oceanic Steamship Company, the American-Hawaiian Steamship Company and a lot of tramp steamers. By trimming [605—549] coal I mean leveling and adjusting coal in the bunkers of a vessel so that the bunkers may be thoroughly filled. The Western Fuel Company supplied coal to all of the vessels which Mr. Mills was trimming. From 1902 until 1904 I continued in this employment for Mr. Mills personally, doing no other work, but from 1904 until 1908 I was also employed by the Western Fuel Company in charge of the Pacific Mail Steamship Company's track and also kept time for Mr. Mills on his vessels. In my employment with Mr. Mills I visited all neighborhoods along the waterfront, and was around the dock and steamers from 6:30 in the morning until about 5:30 in the evening, checking the men when they went on in the morning and checking them off when they got through at night. I would also check them out at noon and back again after lunch. Between times I would have to lodge myself on the boats or in the vicinity of the boats or aboard the barges. At the

(Testimony of David G. Powers.)

times when the men were actually checked in and out, I would be stationed on the dock leading to the steamer. At other times I would go to Mr. Mills' office, or would walk around the track and see Mr. Mayer, the weigher. I would also occasionally go upon the barges. The superintendent in charge of the barges between 1902 and 1904 was Mr. Mills. Frank Wilson and his crowd of men were on the barges. Mr. Mayer, when I would see him, would be located on the track at Mission No. 2, occupied as weigher. The Western Fuel Company were not at that time in possession of Folsom Street dock. Mr. Mayer was mostly at Mission Street, but he would sometimes go to Green Street and other docks. The scale-house at Mission Street dock was located upon the track above the dock, but it was level with the track. The scale-house was away aft, that is, toward the end of the wharf at Mission Street. The weighers faced toward Oakland, so that their backs were to the discharge of coal. I visited the Mission Street docks [606—550] may times during these years 1902 to 1904. I was in Mr. Mill's office every day, and I might drop up to the track to see Mr. Mayer because we were very good friends. I observed the manner in which the coal was being discharged at Mission Street. I do not recall the exact time when the Western Fuel Company gave up the Mission Street dock.

During the two years 1902 to 1904, I observed the manner in which coal was being discharged from the barges into the boats. The method pursued by the

(Testimony of David G. Powers.)

Western Fuel Company in such discharge from barges to vessels was as follows: the tubs would go up about three-quarters full, and when they were being weighed they would be heaping full. All the steamers were loaded by buckets, and the weight by the bucket—the average weight was taken, and most of them from the barges—only a few were loaded from the docks direct. The barge would lie alongside the boat that she was about to coal, and the coal would be hoisted by the bucket load and dumped into the vessel above the bunkers. They had four tubs in the hold of each barge, and the tubs would be filled up and raised and dumped into the vessel. The custom-house weighers and the Pacific Mail Steamship Company weighers would take about three weights a day, and sometimes four or five, and then they would take an average and fill in the other weights and tally the tubs that went up during the day. The tubs in the barges were all numbered, 1, 2, 3 and 4, and said numbers would be painted on the tubs. The tubs were hoisted by an engine. They always went up in rotation, and there were two men to each tub. Sometimes, on the barge "Theobold," which is a very fast barge, they would send up 120 tubs an hour. The net weight of the tubs on that barge was about from 1100 to 1120 pounds, Western Fuel weight. I often saw the boats coaled during the years 1902 [607—551] to 1904.

In 1904 I was employed by the Western Fuel Company as track-tender upon the Pacific Mail Dock. The dock was at the end of Brennan Street, but has

(Testimony of David G. Powers.)

since been destroyed; there is a new dock there now. The track on that dock was used to coal the steamers inshore; that is to say, they would coal these large vessels from both sides—on one side from the dock, and on the other side from the barge. My duties as track-tender during those years, 1904 to 1908, consisted in taking care of the track, and when the engineer was sick in running the hoist on the barges, and also occasionally in acting as assistant weigher to Mr. Mayer in the importation of coal at the Folsom Street dock. I was not employed steadily, but was paid by the day, and I did not work every day. I would be laid off when there was no ship in.

During that same period of time from 1904 to 1908 I was also, as I have heretofore said, performing services personally, as I had performed such services before 1904, for the defendant Mills. I was time-keeper for him. The Pacific Mail Steamship Company trimmed its own coal at that time. I kept time for him on outside steamers. Mr. Mills paid me personally for the services I rendered him, and the Western Fuel Company paid me for the services I rendered it. During those years I was almost every day upon the barges. The defendant Mayer had charge of the track-weighing of the incoming coal. The Western Fuel Company had no one checking the discharge of the coal on the barges except a Mr. Mendenhall, who was there for a short time. I know that Mr. Mayer had charge of all the track-weighing afterwards that is of all incoming coal. Mr. Mills was on the barges three or four times a day, and

(Testimony of David G. Powers.)

sometimes night and day. Mr. James B. Smith did not visit the barges very often, but he was at the [608—552] office of the defendant Mills between 8:30 and 9 o'clock every morning. I am referring now to the periods 1902 to 1904 and 1904 to 1908. James B. Smith had no dock office. After his morning visit Mr. Smith would sometimes but not every day (perhaps twice a week) drop back to the bunkers in the afternoon and stay an hour or two. He was all over. Referring again to the years 1904 to 1908, I several times worked at night. They would coal vessels at night. On such occasions when they were coaling vessels at the Pacific Mail dock, I would be stationed on the barges. The system of coaling vessels from barges during the years 1904 to 1908 was the same as that which I have previously described as pursued during the years 1902 to 1904. Some of the vessels had a hanging scale or rod scale, which is a scale that has a rod on it hanging down to the hold of the ship, and there is a hook at the end of the rod, to which the tub is attached; and when the tub comes up you pull the lever down, and the customs inspector is standing on the deck as the weight is taken. The part of the scales indicating the weight would be located above the hatch. The Government weigher would be stationed on the deck where he would see the weights. This type of scales was used on the "Nanaimo" and the barge "Comanche." The other barges had a scale that rested on a platform on the deck, and tubs would be hoisted up out of the hatches of the barges and placed upon the scale which was

(Testimony of David G. Powers.)

immediately over the hatchway. On the barges which were equipped with the rod or hanging scale it would not be necessary to wait a while and clear the barge out a little before taking the weights; but on the other barges like the "Wellington" or "Melrose" a delay of half an hour or an hour was sometimes necessary, because the well was filled up with coal, and they would have to clear the well out first. The platform [609—553] scales would run on wheels. It was the custom to take the weight of four buckets at a time; that is known as a round of buckets. When the customs weigher wanted to take a weight he would holler down to the hatch-tender, "On the scales." Then the hatch-tender would holler down to the eight men below in the hold of the barge. Then there would be a certain delay. It takes perhaps 15 minutes or 10 minutes to weigh the four tubs. The coal shovellers would go into the fine coal. One man would pick out the lumps and put them in the tubs, and the next man would shovel in the fine coal in order to fill in the vacant spaces, and then the four tubs would go on the scale one after the other, and be weighed. Some of the barges would throw in about 120 tubs an hour, that is, about 2 tubs a minute, 1120 lbs. net weight. They would weigh each tub separately, one after another. I should judge it would take $2\frac{1}{2}$ or 3 minutes to weigh each tub; and while the first tub was being weighed, the remaining three tubs still to be weighed would remain in the hold of the barge. The difference between the method pursued in taking coal out of the hold when

(Testimony of David G. Powers.)

a round of tubs was being weighed, and the method pursued in hoisting the tubs and discharging their contents into the boat was that when the buckets were being discharged into the steamer, they were going up about three-quarters full and there were about 120 tubs an hour, that is about two a minute, or 1120 lbs. net weight. I should judge that it took ten or perhaps fifteen minutes to weigh the four tubs, one after the other. When the first tub of a round of tubs was being weighed, the remaining three tubs would be down in the hold much longer than they would have remained there if weights were not being taken. On the barges which had platform scales, as distinguished from hanging scales, the hatch-tender always had to call two men out of the hold of the ship or barge to assist him in putting the tubs upon the scales when weights were being taken. The men would have to come up from the hold before even the first tub was weighed. This was not true of the barges "Wellington" and "Comanche," which had hanging scales. The hatch-tender always called out his order, "On the scales" in a loud tone of voice. I quite often in the years 1904 to 1908 was on the barge when this order was given, and would be near the hatchway while the tubs were being weighed. I would frequently [610—554] observe that after the cry "On the scales" had been given the coal shovellers would go right into the fine coal; one man would shovel in fine coal, and the other man would put in the lumps, I mean the fine coal to fill in the spaces, and they would fill the tub to overflowing and put it on the scales.

(Testimony of David G. Powers.)

During these four years, 1904 to 1908, I occasionally, but only occasionally, accompanied a barge over to the Folsom Street bunkers for the purpose of observing the barge loaded with coal. This was the method: They would discharge the coal from the bunkers into the barge through pockets; they would empty one pocket all out; the coal was discharged from the bunker through a conveyor right into the barge, and the conveyor would be located at the mouth of the pocket; they would drop the coal into one end of the barge amidships, by which I mean the center line of the barge, forward and backward. I mean that the "dead coal," or fine coal, or screenings, would drop amidships, while the lumps would roll off to one side or the other. After they had one end of the barge loaded they would shift the barge to the other end. It was a matter of indifference whether they loaded from aft forward, or from forward aft. The conveyor or funnel would be located directly over the center line of the barge; and, as I have said, the fine coal would drop straight down while the lump coal would roll off into the wings. That is true for the entire length of the barge.

Returning now to the Mail Dock, I would say that the fine coal, into which, as I have heretofore stated, the shovellers would go when the order "On the scales" was given, was located amidships, that is to say, along the center line of the barge. When coal was not being weighed the shovelers would [611—555] always try to get out the wing coal, the lump coal, first, taking only such fine coal as came along

(Testimony of David G. Powers.)

incidentally. There would be two tubs working forward and two working aft. When weights were not being taken a few lumps would be shoved into the buckets and a few shovels of fine coal, and they would go up about three-quarters full. As to the method in which the tubs were loaded, they were turned on their sides, and the coal scooped in, but when weights were taken they would shovel the coal into the tubs. When the tubs were not being weighed the coal was scooped into them, and they would go up half full. When the tubs were being weighed one shoveler would shovel in the fine coal and the other would throw in the lumps. That was an every day occurrence.

During those four years, 1904 to 1908, I did not see the defendant, Edward Smith, upon the barges. He came there, I think, in 1908.

During those four years, 1904 to 1908, I often visited both the Folsom street and the Mission street docks. I did not act as hatch-tender at all before 1908. I did not act as assistant weigher relieving the defendant Mayer upon either dock during those four years. When I visited the docks it sometimes happened that vessels were being discharged of imported coal. I often saw the defendant Mayer upon the Folsom Street dock during those four years, and I frequently saw the discharge of coal there. I am familiar with the division in the bunkers, the location of the off and inshore bunkers, and with the compartments of each bunker at Folsom street. Coal is discharged over the inshore bunkers. I have never

(Testimony of David G. Powers.)

seen coal discharged over any part of the offshore bunker. I used to see coal discharged into coal cars which [612—556] were afterward propelled over to the scales. The bottom of the coal cars is shaped like a pyramid or an inverted "V." When they wished to empty the car they pulled a chain which opens the doors on both sides, and the coal drops down the slanting bottom. I am familiar with the chutes which open out from the bottom of the hoppers, and also with the chutes which protrude from the north side of each hopper. The cars would coal right underneath the hoppers or at the side of the hoppers at Folsom street—I have seen it both ways. I have seen the cars loading, but I have not been very close to them during the four years from 1904—1908 and when they were loading. The cars used to be overloaded and the coal would roll off and down into the inshore bunkers. I have seen that happen every time I was up there on the Folsom Street dock. I have been in the scales-house there. The man who is taking the weights looks west, with his back to the hoppers. Even if he turns and looks east he could not see very well the operation of loading the cars with coal. I do not believe he could see beyond the first hopper. During the four years, 1904 to 1908, I never saw coal being dropped directly from the hoppers to the pockets of the inshore bunker at Folsom Street, nor did I ever during that period see any coal being brought over the scales at a time when the Government weigher was not present; nor did I at any time between 1904 and 1908 have any conversa-

(Testimony of David G. Powers.)

tion with the defendant Mayer with regard to the discharge of coal upon the Folsom Street dock, and particularly with reference to coal that dropped off the sides of the car into the bunkers below. There was nothing to prevent the coal dropping from the sides of the car into the bunkers below except a board or two to walk along but that was about all; that will not stop it from falling down. I actually saw coal go down into the bunkers in that way.

During the years 1904 to 1908 I frequently visited the Mission street bunkers, more often indeed than the Folsom street bunkers. I used to see the defendant Mayer there all [613—557] the time. He was located in the scales-house weighing the incoming coal and checking it with the Government weigher. The rod which connects the bottom of the scales with the mechanism below the floor of the scales-house at Mission street was exposed for the entire distance between the table of the scales and the floor of the scales-house. Mr. Mayer used to sit right next to the rod, with his feet on the rod. I saw him put his feet up against that rod several times. He used to talk about it himself. He used to boast about how much money he was making and how he was robbing the Government and robbing these "lime juicers," as he used to refer to them, meaning the steamers that used to come there for the Western Fuel Company. Every time you would meet him he would tell you about how much he stole or what he was doing. On a number of occasions, at noon or at five o'clock, I used to see the chutes underneath the hoppers at Mis-

(Testimony of David G. Powers.)

sion street opened up so that the coal would run into the bunkers. At such times the Government weigher would be away eating his dinner, or if it occurred at night he would be at home. I never saw any Government inspectors on the dock at noon-time or after the men were laid off at night. I could not say how many times I saw that practice indulged in, but it occurred several times. It was another common occurrence at Mission Street to load up the car when the weigher had gone to lunch, pass over the scales with it, and at five or ten minutes to one empty such car into the bunkers, and then load it up again and have it ready for the weigher when he came back at one o'clock. Such carload of coal would not be weighed at all. The defendant Mayer certainly saw these operations to which I have just testified. During the four years, 1904 to 1908, the defendant Mills would be upon the docks but not upon [614—558] the bunkers when coal was dumped into the bunkers.

In 1908 I was sent to the Pacific Mail Steamship Company's dock by Mr. Mills to work for the Pacific Mail Steamship Company as a weigher. During the years 1904 to 1908, concerning which I have above testified, the Government weigher on the barges would, when the coal was not being actually weighed, ordinarily remained in the cabin smoking, or back of the engine-room, sitting down talking, he would keep away from the dust; he was afraid of getting dirty. Referring now again to my employment by the Pacific Mail Steamship Company, I remained in their employment about sixty days. I quit them in

(Testimony of David G. Powers.)

disgust. I supposed Mr. Chisholm was my superior, but I got my orders from Mr. Mills. Mr. Mills, in sending me over, told me to give the Western Fuel Company the best of it. In sending me over to the Pacific Mail Steamship Company, Mr. Mills told me that said company had informed him that they were receiving complaints from their engineers about the short-weighting of coal, and had requested that he send them a weigher to assist their own weigher, Mr. Park. I reported to Mr. Chisholm who testified here the other day. My duties during the sixty days of my employment with the Pacific Mail Steamship Company were checking coal with customs weighers on board the barges which were being discharged into the Pacific Mail steamers. I was paid by the Pacific Mail. As to what I observed, it was the same old racket all along; they were robbing the Pacific Mail. I saw the same thing the second day I was working for them. I went to Mr. Chisholm and complained and told him he was being robbed. In answer he tapped me on the back and said, "You are getting your pay, aren't you?" and I said "Yes." Then he said, "Well, go back and sit down and say nothing; keep your mouth shut." That occurred a few days after I started work. During those sixty days I sometimes worked at night, I think on one or two occasions. The Government weigher during those sixty days [615—559] would ordinarily be stationed in the cabin on the barge smoking, or sitting down back of the engine-house. Mr. Park represented the Pacific Mail Steamship Company on the

(Testimony of David G. Powers.)

barges. The Western Fuel Company was represented only by their hatch-tender, they didn't have a checker. I quit the Pacific Mail Steamship Company in disgust. I went to Mr. Donaldson and told him what was going on, and he said, "It runs against your grain to talk like that," and I told him that it ran against my grain to be a thief. Donaldson was the assistant superintendent of the Pacific Mail.

On leaving the Pacific Mail Steamship Company I was immediately employed by the Western Fuel Company. I was employed this time as a kind of an assistant—checking, weighing once in a while, attending the hatch on the barges, and running the engines. I continued in the employ of the Western Fuel Company this time until 1911, leaving on December 13, 1911, so that I was there practically the whole of that last year. I used to run the barge engine quite frequently. I was a plain hoist engine. I worked in this capacity on all the barges, except the "Melrose" and the "Wellington." I would spend only a day or two at a time on each barge. It was an occasional occurrence. I was also a hatch-tender for, I should judge, about a year or a year and a half at intervals. My duties as hatch-tender were to take charge of the gang of men and supervise the discharge of coal from barge into ship. I had nothing to do with the loading of the barges from the bunkers. While I was hatch-tender I would be in the vicinity of the hatchway, and the Government weigher would notify me when a weight was desired. Then Mr. Edward J. Smith would do

(Testimony of David G. Powers.)

all the talking. He was there with me. He was present practically the entire time that I was hatch-tender; in fact, I became hatch- [616—560] tender when he became weigher. Edward J. Smith was employed by the Western Fuel Company just about the time that I left the Pacific Mail Steamship Company. I do not think any one preceded him as weigher on the barges. When the Government weigher wanted a weight, he would communicate his desire to Mr. Smith. Smith would holler "On the scales." I could see the tubs of coal before they would be hoisted to the scales when a weight was desired and also the tubs to be hoisted when no weights were being taken. I could also see the shovellers down in the hold of the barge. When the tubs were coming up and being discharged into the steamer without being weighed they were about three-quarters full; but when they were being placed on the scales they would be heaping up, and this would occur in the presence of the defendant, E. J. Smith. When tubs were being weighed the shovellers would always put fine coal in and lumps; one man would throw lumps in and another man fine coal. They had just as good opportunity during this period after 1908 as they had during the period 1904 and 1908, to which I have previously testified, for doing that. It would take about 8 or 10 minutes to weigh a round of buckets. The maximum number of tubs per hour would be 120, but when they were finishing a bunker or a ship, the tubs would sometimes come up very slow. The minimum number of tubs would be 15 an

(Testimony of David G. Powers.)

hour. The average would be about 90 tubs an hour. Sometimes ships would be coaled out in the stream instead of at the dock. It was the rule always to clean the barges out before sending them back to get a new load, though it would several times happen that the barge would not in fact be cleaned out. When the barges were cleaned out Mr. Mills would figure up his books and his overs or his unders, which would [617—561] show on the books. I never made any entries in the books of the defendant Mills. My brother did. My brother was employed by the Western Fuel Company about four years, I believe, as assistant to the defendant Mills. He quit on July 1st, 1911, and at that time he had been working there since a time prior to 1908. I became assistant to defendant Mills after my brother left. Between the time that I left the employ of the Pacific Mail Steamship Company and the time I became assistant to the defendant Mills, I frequently visited the Folsom Street dock and the Mission Street dock. The latter dock was dismantled about December, 1912. I am not sure about the date. The Western Fuel Company was still using that dock when I quit. From 1908 until 1911 the Folsom Street dock was more frequently used for the discharge of foreign coal than any of the other docks. Mayer was more frequently at Folsom Street, but he was located at both docks. When I was assistant to defendant Mills I frequently attended to the coaling of the barges, and I often accompanied a barge over to Folsom Street dock for the purpose of taking on coal. I would get

(Testimony of David G. Powers.)

the weights of the coal from the weigher Mayer. I always cleaned a pocket out when we were loading a barge from the offshore bunkers. A barge would be charged exactly with the weight of the contents of the pockets. The weights would be given to Mr. Mills by the defendant Mayer. I sometimes acted as assistant to Mayer in loading coal into the barges at Folsom Street after I left the Pacific Mail Steamship Company. This was only occasionally to relieve Mr. Mayer when he was at Mission Street. Upon such occasions I would handle the discharge of the coal into the barges myself. I certainly would check off the weight of the coal discharged into the barges. We weighed the coal and kept track of every pocket. We weighed [618—562] the coal into the cars and kept track of the pockets and the train loads that were emptied into said pockets. All the pockets were numbered. Then engineer in charge of the train would get his orders as to what pocket to put the coal into from the weigher in the scale-house. At Mission Street they have 15 pockets, but I have forgotten the number at Folsom Street. The partitions in the bunkers extended right up to the track, so that every partition or pocket was completely separated from the others. During the period between the time when I left the Pacific Mail Steamship Company and December, 1911, when I left the Western Fuel Company, I frequently saw imported coal being discharged by way of hoppers or towers into cars. They would always load the cars up and let the coal run back into the inshore bunker. That was a fre-

(Testimony of David G. Powers.)

quent occurrence. The chutes through which the coal runs from hopper to car are operated by the men on the train by pulling a cord which would open the chute cover and let the coal run into the car. It was a common occurrence to see the chute thus opened and the coal permitted to run down the sides of the car into the bunkers. I never at Folsom Street (I have just been talking about Mission Street) saw the chutes open and the coal permitted to run into the bunkers below without being weighed during these years 1908 to 1911. A number of times they used to load a car up just before the weigher would go to lunch, that is, a few minutes before 12 o'clock, and run it over the scales and back again, and switch it back five minutes to one, dump it into the bunker, and then load it up again before the weigher returned. That occurred both at Folsom Street and at Mission street and was frequent.

I am familiar with the scales both at Mission Street and at Folsom Street. At Folsom Street the scale-house was [619—563] located on the westerly side of the dock, and the weigher faced in a westerly direction with his back toward the operations, whereas at Mission Street the scale-house was at the easterly end of the dock, and the weighers looked out toward the bay with their backs toward the operations. I recall the discharge of the "Dumbarden" and the "Germanicus" at Folsom Street. There was a considerable shortage in the discharge of the former. I had a conversation at Mission Street with the defendant Mayer concerning the scales before the discharge

(Testimony of David G. Powers.)

of the "Dumbarden." That conversation occurred coming down the back stairs that led into the engine-room or the fire-room. Mayer then told me that the scales would rest or be upheld by blocks or uprights underneath, so that they would not register the true weight. He told me he knew all about it. That conversation took place a few days before the discharge of the "Dumbarden." I never was under the scales myself. I was not present when one of the uprights was sawed off. That is the only conversation that I had with Mayer regarding the scales at Folsom Street. I had a conversation, however, with him regarding the link which was in use for the purpose of short-weighting coal. I have forgotten the date of the conversation, but I know that a man named Murray was then weighing coal for the Government. Murray made the blacksmith change the link and Mayer spoke about it and said, "Why, gee, we ain't doing a thing to these lime juicers and these other people (he meant the Government) with the bent link between the second and third cars." There were four cars to the train, and the link was between the second and third cars. Mayer told me how he was defrauding the Government with this link. I was present when the existence of the link was discovered. [620—564] Murray weighed a trainload of cars and was not satisfied with the result; so having weighed the train going one direction, he then switched it back and weighed it going the other direction, and the discrepancy in the weights was revealed. I did not see the link myself. Mayer told

(Testimony of David G. Powers.)

me that the link was bent in such a way that it would lift a certain amount of weight off the last two cars. He did not tell me how long the link had been in use. Billy removed it. I don't know whether they put it back or not. I didn't pay any particular attention to it, though I saw it being taken out.

I remember the vessel "Algoa." I believe she was loaded at Folsom No. 2 about 1909, but I am not sure of the date. She was being used as a store ship. She belongs to the Pacific Mail Steamship Company. They anchored her in Mission Bay when she was loaded. I do not remember that I assisted in the loading. I weighed the coal out of her in her discharge, and I think that was in the latter part of 1910. The hatches at that time were battened down. We had to remove the hatches and the canvas over them. The captain always ordered the hatches battened down after the boat had been loaded. My brother Eddie, who was assistant superintendent, was acting as superintendent at the time of the discharge of the "Algoa," because Mr. Mills was sick. I weighed out the coal that was discharged from the "Algoa." As I remember it, they loaded one barge first, and then they stopped for a while and later finished discharging the "Algoa" into the barges. A fire had occurred in the cargo, ignited by spontaneous combustion. The name of the captain was Lockart. They stuck a lot of pipe down in the coal, but no water was poured in, because there was no fresh water on the ship, and they did not want to use salt water because Mr. Mills claimed that it would take

(Testimony of David G. Powers.)

the strength out of the coal. [621—565] No water, therefore, was put upon this cargo. There must have been a shrinkage in the weight of the cargo due to the fire. I once knew what it was, but I do not recall it now. The coal that was taken out of the "Algoa" was loaded into Pacific Mail Steamship Company's vessels. The Government weigher and Mr. Park assisted in weighing the coal out of the barges into these vessels. I do not think the Western Fuel Company had a weigher present. My brother Ed kept a record of the discharge weights until Mr. Mills came back after his illness, and then he did it. I do not now recall the exact weight of the cargo as it was checked into these barges. I can say, however, that the cargo as checked into the Pacific Mail Steamship Company's vessels weighed more than when it was checked from the "Algoa" into the barges. The records kept by the defendant Mills will show the weights.

The men who trim coal know nothing at all about the weighing of coal.

The situation at night-time was much the same as that at daytime with reference to the discrepancy existing between the tubs that were and the tubs that were not weighed upon the barges. Sometimes the coal would come up three or four or five lumps in the tub. At other times the tubs would be three-quarters full or a little more full. A man would have to stand right over the hatch at night in order to see the contents of the tubs. As to lights, the Western Fuel Company owned about four or five lanterns, and the

(Testimony of David G. Powers.)

steamship company, I think, would produce one light, an electric light, which was located up high so that the engineer could see the bumper. Sometimes there would be two lights up at the bumper. The actual height of the bumper, and therefore of the lights, [622—566] would depend upon the height of the ship; so that sometimes you might be close down to the deck, and at other times 50 or 60 feet from the bottom of the barge. There were no lights other than those which I have mentioned, except a small lantern which Mr. Park used to use to look at the scale. The lanterns on the barges were ordinary coal oil and swinging lanterns, and were the only lights in the vicinity of the hatchway except the electric lights that I have mentioned. It would not be possible to see the amount of coal in the tubs at night except when the tubs were actually being weighed, unless a person were standing in the immediate vicinity of the hatchway. Sometimes it rained at night. The custom-house weigher would ordinarily stand near the boiler at night to keep warm or else in the cabin. Upon other occasions he would walk up and down the barge. The Government weigher would not station himself near the hatchway except when the tubs were actually being weighed.

The men in the hold of the barge would be distributed two to each bucket. There were eight men in all.

The defendant, Ed. Smith, acted as a weigher or checker when I was employed as hatch tender. I spoke to him about the overloading of the tubs that

(Testimony of David G. Powers.)

were weighed, and he said to me that he knew all about it; and I asked him why they didn't pay white men, or pay the other engineers of the Pacific Mail Steamship Company, and Mr. Smith told me they didn't have to pay them. He said that "the good fellows got a ton of coal, and Mr. J. B. Smith is a good friend of R. P. Schwerin, and he gets a check from J. B. Smith." I was asking him, you see, why the white engineers were not paid like the engineers on the Japanese lines. Ed Smith told me several times that his brother, J. B. Smith, and Schwerin were friends. He also spoke of the time that J. B. Smith and Schwerin went on the steamer "Bear" [623—567] or "Beaver" on the trial trip around the bay, the date of which I have forgotten. The defendant, Ed Smith, used to ask me to let him know from Mr. Mills' books how much the barges were overrunning, and I used to report the same to him.

When the defendant Mayer would leave Folsom Street to go to another wharf, I would take his place frequently at Folsom Street. I also sometimes took his place at Mission Street. Sometimes I would relieve him two or three days at a time. I would then be weighing coal. I would perform the same duties that he ordinarily performed. I many times had conversations with Mayer regarding the short weighing of coal imported into the United States.

I had a conversation with the defendant Mills regarding the overages that are set forth in his books. When I mentioned the overages to him he told me to keep my mouth shut, and that it was none of my business.

(Testimony of David G. Powers.)

On December 18, 1911, I watched the steamship "Korea" being coaled at Pier 44. Customs agents, John W. Smith and E. P. Enlow were with me. The "Korea" is a Pacific Mail Steamship Company liner. She was being coaled from the barge "Wellington." Mr. Edward J. Smith was upon the barge acting as weigher. Our visit to the "Korea" occurred about six o'clock. The coaling continued throughout the entire night. We stayed until the coaling for that night was completed. We were there all night, practically 12 hours. We located ourselves on the captain's bridge of the "Korea." Mr. Smith and the men on the barge could not see us. I guess that we were within 30 or 40 feet from the tubs; we were just about level with the electric lights at the bumper. We could by the aid of these lights see the quantity of coal contained in the tubs as they came up. The [624—568] tubs were coming up about 45 an hour. Three weights were taken that night and only three, that is, from six o'clock at night until six o'clock in the morning. When these weights were taken 12 buckets were weighed; that is to say, three rounds of four buckets to a round. When the tubs were being weighed they were overloaded, heaping full, and when they were not being weighed they went up very light. Sometimes, indeed, they had to send the tubs back to put more coal in them, because they did not contain enough coal to trip at the bumper. Neither Mr. Ed Smith nor any of the Western Fuel Company's officials knew that we were on the captain's bridge—not that I know of. I saw defendant Ed-

(Testimony of David G. Powers.)

ward J. Smith there the first part of the evening when they were taking the first weight, but I didn't see him afterwards. The Government weigher was out of sight—in the cabin. I and the two customs officials saw him go there. He was within proximity of the hatchway when the three weights that I mention were taken. Weights were taken when the command "On the scales" was given. The "Wellington" was equipped with platform scales. Two of the shovellers had to come up from the hold when the weights were taken. It took from eight to fifteen minutes to get the weights. After the first tub was weighed the remaining three tubs were still in the hold of the barge. In January, 1913, I witnessed the discharging of the "Americano" with two Government officials at Folsom Street dock No. 2. The "Americano" is now sunk, and I don't know whom she belonged to at that time that she was carrying coal for the Western Fuel Company. The Government weigher who was present taking the weights was Mr. Phelan. Mr. John W. Smith accompanied me on that occasion. He was a Government official. We stood around the dock from about half past eleven until about half past one o'clock. Mr. Phelan went for his lunch about five minutes to twelve o'clock, and he returned a few minutes after one. In his absence Mr. [625—569] Smith and I observed that at about five minutes to twelve four cars were loaded out of the hopper, run up to the scales, and then run back again and dumped without being weighed. I do not know who had charge of the cars.

(Testimony of David G. Powers.)

The weigher on the dock at that time was Mayer. He must have seen the incident that I have mentioned. He was present because I saw him come downstairs afterward. After being dumped those four cars were loaded up again under the hopper, and when Mr. Phelan came back from lunch the new load of coal was run up to the scales and weighed.

At the Howard and the Green street docks there is no scales-house, so the imported coal is tallied out and weighed. They are supposed to take one weight in every 15, but in practice they would take three or four weights a day and fill in the other weights and make averages. In the weighing out of this imported coal, the tubs that were to be weighed would be very light, and the tubs that were not to be weighed were full. The situation is just the reverse of that on the barges. The occurrence that I have described was frequent.

At Folsom street there were only a few boards under the hoppers, so that the coal would drop down below into the inshore bunkers. The chutes leading from the hoppers were opened or closed by the men in charge of the coal cars.

Cross-examination by Mr. STANLEY MOORE.

Mr. STANLEY MOORE.—Q. Mr. Powers, is it a fact that Mr. Tidwell has stated to you that if these defendants are convicted and are imprisoned and fined that you are to receive a portion of the fines?

A. No, sir.

Q. He has never made that statement to you?

A. No, sir. [626—570]

(Testimony of David G. Powers.)

Q. Has he ever said to you that he had recommended the bringing of a civil action upon the ground of fraud with respect to these matters?

A. No, sir.

Q. He never has made any such statement as that to you? A. No, sir.

Q. He never has stated then that he intended to bring an action for a penalty in double the value of the 62,000 tons of coal as to which it is claimed the overage is wrongful? A. No, sir.

Q. And that you would receive a proportion of that? A. No, sir.

Q. You never have stated to any one that Mr. Tidwell or anybody else has said to you that you would receive a percentage or a proportion of the fines or penalties that should be recovered?

A. No, sir—

Mr. ROCHE.—(Intg.) Just one minute. That question is objected to, may it please the Court, as too indefinite, and that no proper foundation is laid if the question is put for the purpose of impeachment.

The COURT.—The objection is overruled; it may not be put for the purpose of impeachment, he may admit it.

Mr. STANLEY MOORE.—Q. Now, Mr. Powers, have you seen the statement or heard of the statement that you were to receive a part of the fines or penalties recovered?

A. Yes, sir, I have read that statement.

Q. You have read that statement, have you?

(Testimony of David G. Powers.)

A. Yes, sir.

Q. Do you recall reading that statement in the "Bulletin," the "San Francisco Bulletin" of February 6th, 1913, at the time the subpoena was served upon the Western Fuel Company to produce its books? A. Yes, sir.

Q. And that statement was, in brief, was it not, that you would be rewarded by Uncle Sam with a percentage of any moneys that [627—571] may be recovered from the accused coal operators?

A. Yes, sir.

Q. You recall that, do you? A. Yes, sir.

Q. Do you remember yourself giving out a long interview to the "Examiner" on February 19, 1913, just about two weeks after the appearance of the "Bulletin" article? A. I do.

Q. You gave a pretty full account of what you said your testimony would be, did you not, in the course of that interview? A. I did.

Q. Did you state to the "Examiner" reporter to whom you gave that interview that you were to receive a large percentage of all moneys which through your work would be saved to the Government, and that if the indictments brought concerning the frauds were proved that you would receive a reward that would make you almost independent for life?

A. I did not.

Q. You did talk with the "Examiner" reporter on that day, did you not? A. I did, yes, sir.

Q. And you are acquainted with him?

Q. Yes, sir.

(Testimony of David G. Powers.)

Q. I want to ask you about this article in the "Bulletin" of February 6th, 1913; you were acquainted at that time with Mr. Masters and Mr. Gleason, the gentlemen who have been mentioned by Mr. Tidwell in connection with the "Bulletin"?

A. I never heard Mr. Tidwell's testimony so I don't know what you're talking about.

Q. Well, did you know at that time a Mr. Masters and a Mr. Gleason who were then employed on the "San Francisco Bulletin"? A. I did.

Q. And you had known them for some time before that, had you not?

A. No, sir—before what date, pardon me?

Q. Before February 6th, 1913?

A. Yes, sir, I did.

Q. How long prior to that time had you been acquainted with [628—572] them?

A. Oh, I should judge about perhaps eight months, or something like that.

Q. You had talked with Mr. Tidwell in their presence, had you not, on various occasions prior to that time? A. I had not.

Q. Do you recall that in this "Bulletin" article—and to refresh your recollection I will exhibit the article to you, and if you like you can just look at it, Mr. Powers—I say do you recall that in this "Bulletin" article a full account and in detail was contained there of what your testimony would be, going over these matters with respect to the weighing of the buckets, and the three-quarters full and the half full and so forth, that have been testified to here?

(Testimony of David G. Powers.)

A. Yes, sir, I made those statements.

Q. You made those statements, did you not?

A. To the paper.

Q. To the "Bulletin" representative at that time?

A. I did.

Q. This information, Mr. Powers, that is contained in this "Bulletin" article of February 6th, 1913, was given by you to the representative of that paper, was it not? A. It was.

Q. Mr. McNab did not give out that information to your knowledge, did he?

Mr. ROCHE.—Just one minute. That question is objected to upon the ground that it is not proper cross-examination and upon the ground that it is immaterial.

Mr. STANLEY MOORE.—Well, I am just trying to show, if your Honor please, that the witness, so far as that article is concerned, that he is the man who gave out the information and all the information contained therein.

Mr. ROCHE.—He just testified to that. [629—
573]

The COURT.—Yes, he just said so.

Mr. STANLEY MOORE.—Very well then, your Honor.

Q. Now, I call your attention to these statements in this article, the information for which you testified you gave out, and all of which you gave out; you speak here about having charge of the barges and about the trouble that you got into, and the trouble affecting Robert Donaldson, and what you did in re-

(Testimony of David G. Powers.)

gard to that, which I will not take time to stop to go into now; and then after reference to opium, this article states: "Powers was then induced to turn over to United States District Attorney McNab the information concerning the big coal frauds which brought about the present Western Fuel Company scandal; he will be rewarded by Uncle Sam with a percentage of any moneys that may be recovered from the accused coal operators." Now, Mr. Powers, did you not in giving out the information that made up that article and in relating in detail as to what your testimony would be, did you not also state that as a reward for giving that information you expected to be rewarded by Uncle Sam, or the United States, with a percentage of the fines or penalties which might be recovered? A. I did not.

Mr. ROCHE.—Will you let me see that article please, Mr. Moore?

Mr. STANLEY MOORE.—Certainly, Mr. Roche, I will hand it to you.

Q. Now, Mr. Powers, I want to direct your attention to an article in the "San Francisco Examiner" of date—

Mr. ROCHE.—Of course, in fairness to the witness, Mr. Moore, you will concede that this "Bulletin" article does not purport upon its face, in so far as the matter which you read to the witness is concerned, to be a quotation from the witness? [630—
574]

Mr. STANLEY MOORE.—Well, the article speaks for itself in that regard, Mr. Roche. It states

(Testimony of David G. Powers.)

the witness' attitude in this matter, his history of these transactions, and what his testimony was going to be. I thought it was conceded that he gave all the information which went to make up that article.

Mr. ROCHE.—Well, you have had experience enough with newspaper reporters, Mr. Moore, to know —

Mr. STANLEY MOORE.—Now, Mr. Roche, don't begin to argue the matter. We will get along with the proof a great deal faster if you do not argue, notwithstanding the fact that that statement appears in the newspapers over and over and over again.

Q. This article in the "Examiner," on February 19, 1913, is a very large article, containing among other things a picture of yourself?

A. I read the article.

Q. And it gives in almost as complete detail as you have given here in the last day or so the testimony—your testimony with respect to this case, does it not?

Mr. ROCHE.—That is objected to, may it please the Court, as calling for the contents of the printed article. If counsel wants to put the article in evidence let him put the article in evidence.

Mr. STANLEY MOORE.—I have no objection to the article being marked in connection with the testimony of the witness. I am examining him as to his state of mind.

Q. You gave out the material that made up that article, did you not? A. I did.

Mr. ROCHE.—What is the date of that article, Mr. Moore? [631—575]

(Testimony of David G. Powers.)

Mr. STANLEY MOORE.—It is February 20th; the conversation was on February 19th, but the paper came out on the morning of February 20th.

Q. Mr. Powers, I call your attention to this part of the article: "It was through this man, David George Powers, now in the Government employ as a Special Agent, that the evidence for the indictment was brought to the Grand Jury. The present exposé has come about purely in the line of Powers' regular duties. He did not instigate the investigation as a means of revenge. Powers receives a large percentage of all moneys which through his work are saved to the Government. If the indictments are brought home and the frauds proved Powers will receive a reward that will make him almost independent for life." Now, Mr. Powers, calling your attention to that part of the article, I ask you if it is not the fact that you stated those matters to the "Examiner" reporter, that you were then a Special Agent, that you did not instigate this investigation as a matter of revenge but purely in the line of your duties, and that if the frauds were proved and convictions resulted that you expected enough of money by way of a proportion of the fines, to make you almost independent for life?

A. I have stated everything, but I did not state to the "Examiner" that I expected a reward that would make me independent for life, or any other reward.

Q. That is an answer to the question. Did you ever hear, Mr. Powers, that Mr. Tidwell had stated

(Testimony of David G. Powers.)

that if these defendant were convicted and fines and imprisonments imposed, did you ever hear that he had stated to any one that you would receive a proportion of the fines? A. No, sir. [632—576]

Q. Did you ever read anything in the "Bulletin" to that effect? A. Not that I remember of.

Q. Do you remember reading an article in the "Bulletin" at or about the 1st day of August of this year, 1913?

A. About what,—about this case?

Q. Yes, about your interest in the case?

A. No, sir. I may have read it, but I have forgotten. You might let me look at it, won't you?

Q. In that article, Mr. Powers, an interview was given by Mr. Tidwell, was there not?

A. I don't know anything about the article; why don't you show it to me?

Q. I have the article and I thought it was here; perhaps I can find it in a moment.

Mr. ROCHE.—What article are you referring to now?

Mr. STANLEY MOORE.—An article of date, August 1st,

Q. You remember, do you not, at a time when you thought Mr. Tidwell was going to discontinue you as a Special Agent; you remember that time, do you not?

A. You better show me the article and then I will remember it better.

Q. I am asking you if you remember the time. I will withdraw that. You were made a Special

(Testimony of David G. Powers.)

Agent temporarily by Mr. Tidwell a number of times, were you not? A. I was.

Q. When were you first put on as a Special Agent for the Government at the recommendation of Mr. Tidwell? A. Sometime during 1913.

Q. Sometime during 1913; can you be more definite in your answer with respect to that than by answering sometime during 1913?

A. I don't know the exact date.

Q. No, I am not asking you for the exact date, Mr. Powers, but [633—577] approximately when was it, please, in 1913, that you became a Special Agent?

A. Oh, it was back in—it was in 1912 rather, back around August, I believe.

Q. Oh, it was not sometime in 1913, according to your present recollection, but it was back in 1912 and around August, you believe? A. Yes, sir.

Q. For what length of time would you be appointed in each instance upon the recommendation of Mr. Tidwell? A. Ninety days.

Q. It was a temporary appointment as Special Agent for 90 days which could be had upon his recommendation, was it not? A. Yes, sir.

Q. Do you remember a time when you heard that Mr. Tidwell had received some kind of word or instruction that that should not go on any longer?

A. Yes, sir.

Q. When was that?

A. I have forgotten the exact date.

Q. You have forgotten that date?

(Testimony of David G. Powers.)

A. You ought to know, you have the clipping there in front of you, haven't you?

Q. No; but I am asking you about when that was, irrespective of any clipping.

Mr. ROCHE.—That was sometime, Mr. Moore, in—

Mr. STANLEY MOORE.—Now, never mind, Mr. Roche,—I want to examine the witness.

A. I believe it was about July or sometime around there, 1913.

Q. You think it was about July, 1913?

A. Before that, perhaps in June. I am not sure.

Q. You made some aspersions or charges against Mr. Tidwell at that time, did you not?

A. I made a statement.

Q. Yes, when you understood that the job was not going to last any longer you said something that was a little derogatory to your chief, didn't you? [634—578]

A. No, sir, not because the job was not going to last any longer.

Q. All right; you say you thought he was very well pleased when people had not been able to find anything in this case against the Western Fuel, didn't you?

A. I said that Mr. Tidwell sent two men down there, or three men down there, from his office to weigh coal, and to look out for everything, and when their backs were turned to the scales and to the bunkers they couldn't see anything and they went back and reported they had not seen anything.

(Testimony of David G. Powers.)

Q. And didn't you say that when Mr. Tidwell had sent to the Special Agents down there and they came back to Mr. Tidwell and reported they had not seen anything, or saw anything, that Mr. Tidwell seemed very well pleased?

Mr. ROCHE.—That question is objected to, may it please the Court, upon the ground that it is not proper cross-examination, and upon the further ground that it is immaterial.

Mr. STANLEY MOORE.—I will withdraw it at this time.

Q. Referring to this "Bulletin" article of August 1st, 1913, at the time you understood the Special Agent job was not going to last, you made a statement to the newspapers at that time, did you not?

A. You bet I did.

Q. Yes, you were heard from; and Mr. Tidwell—he made a statement too, did he not? A. He did.

Mr. ROCHE.—Just a minute. That is objected to, if your Honor please, as calling for the conclusion of the witness. We have Mr. Tidwell's testimony upon that subject.

Mr. STANLEY MOORE.—Very well.

Q. Then the "Bulletin" purported to quote according to your recollection a statement as coming from Tidwell, did it not? A. I don't know. [635—579]

Mr. ROCHE.—Wait a moment. That is objected to, if your Honor please, upon the same grounds.

The COURT.—The objection is sustained.

(Testimony of David G. Powers.)

Mr. ROCHE.—Let us try this case fairly, Mr. Moore.

Mr. STANLEY MOORE.—Well, Mr. Roche, that is very good advice; and if we do that you should not try and suggest to your witness and have him testify that we had an overage of 50 or 60 per cent, and that percentage assumed by you in every question you ask the witness thereafter, until it is actually shown by us that it is reduced to a very small percentage, and then you interrupt us when the witness is turned over for cross-examination. I am glad that you speak about trying the case fairly, because that is the way a Government representative ought to try a case.

Mr. ROCHE.—And that is the way the Government representative is trying the case.

Mr. STANLEY MOORE.—Well, that is a matter of opinion, Mr. Roche, which we are ready to leave to this jury.

Q. Now, answer the question, Mr. Powers?

A. I made those statements; yes, sir.

Q. You read that statement, didn't you?

A. Yes.

Q. I am referring you now to what purports to have been a statement or some statements made in the paper by Mr. Tidwell. Did you also read that?

A. Oh, I didn't pay any attention to that; I don't know what Mr. Tidwell said from what the papers said; I only know what I said and what I told the papers. I cannot testify to what Mr. Tidwell said.

Q. I am asking you now because Mr. Roche

(Testimony of David G. Powers.)

thought that in fairness to you I should exhibit the article to you.

Mr. ROCHE.—No, that was not my suggestion at all. [636—580] My suggestion was that you were asking the witness to testify to something concerning which you claim Mr. Tidwell made a statement about.

Mr. STANLEY MOORE.—Yes, and as to whether he read that in the “Bulletin.”

A. I don’t know what Mr. Tidwell said.

Q. I want you to read the part of the article I now indicate to you, being the lower part of that first column (handing). The portion just directed to the attention of the witness, for the purpose of the record, reads—

Mr. ROCHE.—(Intg.) Now, just a moment, Mr. Moore. Your Honor please, counsel has no right to read this.

The COURT.—What is the purpose of this, Mr. Moore?

Mr. STANLEY MOORE.—I want to show that he has read it, that it was an interview by himself, and that he read that part of it in relation to what Mr. Tidwell said. I want to bring home to him that the statement was made repeatedly by Mr. Tidwell that he would get a part of the fines that would result from a prosecution here.

Mr. ROCHE.—Your Honor can readily see the method pursued by counsel: Mr. Tidwell is put upon the stand and upon cross-examination he is asked whether he did not make certain statements to re-

(Testimony of David G. Powers.)

porters, and that statement is positively denied by Mr. Tidwell. Instead of producing the men to whom counsel claims Mr. Tidwell made this statement, because they cannot be produced—

Mr. STANLEY MOORE.—Mr. Roche, we will produce half a dozen of them.

Mr. ROCHE.—Just a moment. I know what you can and what you cannot do. I say you cannot produce them. [637—581]

Mr. STANLEY MOORE.—We will produce them.

Mr. ROCHE.—Counsel is endeavoring to ring into this case through a newspaper article some statement that he claims or asserts Mr. Tidwell made. I submit that that is not the proper way of trying to get that testimony into this record.

Mr. STANLEY MOORE.—Here is the proposition, your Honor, and this is what I am endeavoring to do. He disclaims that Mr. Tidwell ever personally made that statement to him. Now, he has gone farther than that and says that he never has heard that Mr. Tidwell made any such statement as that, never heard anything of that kind attributed to Mr. Tidwell. I want to lay a foundation all along the line with respect to the testimony of this witness concerning that subject matter for the purpose of impeachment, and we will impeach him very fast when the proper time comes in that regard and in very numerous quarters. I contend that I am entitled to direct his attention to this statement appearing in the "Bulletin," which I claim appears

(Testimony of David G. Powers.)

there in connection with the statements made to the "Bulletin" by Mr. Tidwell and with respect to the statements and interviews given to the "Bulletin" by Mr. Tidwell, and to ask him if he did not read it, and if it does not contain the statement again that he is to get a percentage of the moneys.

Mr. ROCHE.—Now, your Honor will observe what counsel is still persisting in doing; he is still reiterating, in the presence of the jury, that he intends to direct the witness' attention to statements made by Mr. Tidwell to the "Bulletin," statements which in fact Mr. Tidwell never made and which counsel knows he never made and— [638—582]

Mr. STANLEY MOORE.—No, I don't know that he never made them. And I object to that as misconduct, if your Honor please. I know that we are going to prove that Mr. Tidwell made the statement to the witness over and over again, and I don't believe Mr. Tidwell himself is going to deny it.

Mr. ROCHE.—If counsel claim that Mr. Tidwell made any statement to any newspaper reporter, at any time or under any circumstances or at any place, before he has a right to assume and state in the presence of the jury that the statement was made he ought to substantiate it by proof; and he cannot assume in a question put to him to this witness that Mr. Tidwell made any statement which first is not established to have been made by him, particularly in the teeth of his denial.

Mr. STANLEY MOORE.—Mr. David G. Powers is under cross-examination now and not Mr. Tidwell.

(Testimony of David G. Powers.)

When Mr. Tidwell was under cross-examination I did attempt to examine him with reference to these newspaper articles, and I was not permitted to do it because of an objection made. Now I claim, whether it appeared in the "Bulletin" or whether it appeared in the "Examiner" or whether it appeared anywhere else, I claim I have the right to examine this witness whether in any manner or from any source it ever came to his ears or to his knowledge that the statement was being made here by the special agent that he would be financially rewarded as a result of the successful prosecution of these cases. It does not make any difference, for the purpose of this question, whether it was in the "Bulletin" or where it was.

The COURT.—Yes, that is true, but the only difficulty about your question that I see is the assumption that Mr. Tidwell made the statement. If you base your question on the [639—583] statement that it appears from the paper as though Mr. Tidwell had made the statement, and not base it on the fact that Mr. Tidwell made the statement I see no objection to that, and that only for the purpose of showing whether or not it had ever been brought home to this witness, the possibility of receiving any reward in case of the successful prosecution of these cases.

Mr. STANLEY MOORE.—That is the purpose of the examination, your Honor.

Mr. ROCHE.—Of course, we have not any objection to that kind of an examination being pursued,

(Testimony of David G. Powers.)

but counsel was not pursuing that kind of an examination when I made the objection.

Mr. STANLEY MOORE.—Q. Mr. Powers, did you read the whole of this "Bulletin" article?

A. I just read it now, yes.

Q. Do you mean to be understood as testifying here that you did not read it at the time the article appeared, or at least that portion of it to which just now I called your attention?

A. Well, I would not swear that I read the whole article, no.

Q. You gave a statement to the newspaper in the course of that article, did you not?

A. In the course of that article—I spoke to the newspapers, any statement that ever appeared in the newspapers from me I made, anything that ever came out.

Q. Mr. Powers, you were casting aspersions, or you were at outs temporarily at least, or disaffected by reason of this news that you received concerning your position?

Mr. ROCHE.—Now, just one minute—

A. (Intg.) No, not at all.

Mr. ROCHE.—All right, let it go. [640—584]

Mr. STANLEY MOORE.—Q. You read an article in which you said something about Mr. Tidwell, did you not?

A. You read the article,—read the article to the jury.

Q. I am asking you, Mr. Powers, whether that is correct, or not? A. Read the article, please.

(Testimony of David G. Powers.)

The COURT.—The article speaks for itself, I suppose.

Mr. STANLEY MOORE.—Yes, your Honor; that is true. The article does speak for itself, but can't he state whether he did or whether he did not?

The COURT.—He says he gave out whatever is contained in the article as purports to come from him.

Mr. STANLEY MOORE.—If that portion of the article speaks for itself I would like to read the rest of the article relating to Mr. Tidwell.

Mr. ROCHE.—That is just the difficulty about this matter, if your Honor please. Counsel is trying to ring in here something that Mr. Tidwell is alleged to have said. He has a right to impeach Mr. Tidwell if he can impeach him by putting a reporter on the stand to whom he made that statement, but he has no right to impeach him by introducing in evidence here a newspaper article which did not emanate from him.

Mr. STANLEY MOORE.—I am examining the witness concerning his state of mind, if your Honor please.

The COURT.—I know that, Mr. Moore, and I have suggested what you could do.

Mr. STANLEY MOORE.—Q. Mr. Powers, is it not a fact that you understood you read the whole of that "Bulletin" article?

A. I just answered you that I would not swear I read the whole article.

Q. Have you any recollection of reading the part

(Testimony of David G. Powers.)

and parcel of [641—585] it to which I have just referred you, relating to Mr. Tidwell?

A. No, I would not swear to that.

Q. Do you state here and testify that you did not read that part of it?

A. I may have I said; I would not swear to it unless I was sure of it.

Q. Do you repeat now, Mr. Powers, that neither Mr. Tidwell nor anybody else has ever told you at any time that in the event that these defendants were convicted and imprisoned and fined that you would receive a portion of the fine?

A. Mr. Tidwell told me nothing of the kind.

Q. Well, did anybody else tell you that?

A. Not that I remember.

Q. Do you mean to say that you cannot now recall as to whether they did or did not?

Mr. ROCHE.—Just a moment. That question has been asked and answered already, if your Honor please.

Mr. STANLEY MOORE.—I can test his recollection in regard to that, your Honor, and I want to know whether he testified positively.

The COURT.—The objection is overruled.

A. Yes, I canot recall.

Mr. STANLEY MOORE.—Q. Do you mean to testify, Mr. Powers, that you don't remember either one way or the other as to whether some one else may have told you that? A. I don't remember.

Q. Has any one told you that there are United States statutes which apply to such cases as this, and

(Testimony of David G. Powers.)

which give to the informer a percentage of the fines?

A. Yes, sir.

Q. Who told you that?

A. Oh, I have forgotten the party's name. [642—

586]

Q. You have forgotten the party's name?

A. Yes.

Q. Did the party tell you what proportion of the fines the informer would be entitled to in such cases?

A. I have forgotten.

Q. You have forgotten whether he told you the percentage or proportion of the fine that the informer would be entitled to in such cases?

A. Yes, sir.

Q. Did he not tell you that that would be on the recommendation of the chief special agent, approved by the Secretary of the Treasury, and generally speaking was a moiety which amounted to one-half? A. No, sir.

Q. Where was this party at the time you had this conversation with him? A. I don't remember.

Q. When was it that you had this conversation?

A. I don't remember.

Q. You don't remember that?

A. I have forgotten the date.

Q. About how long might it have been?

A. Do you want me to tell you something I don't remember?

Q. I am asking you, Mr. Powers, do you mean to be understood as testifying before this Court and jury, and as wanting to testify that you have no

(Testimony of David G. Powers.)

recollection either in regard to the time or the place or the person with whom you had that conversation?

A. I forget.

Q. Well, can you state at this time whether or not there was more than one conversation in which that statute and that matter was mentioned in your presence and hearing? A. I don't remember.

Q. Can you recall at this time whether or not there was more than one person who mentioned that statute and matter to you?

A. I forget now. [643—587]

Q. Well, now, Mr. Powers, have you ever stated to anyone that you did expect to receive a large amount of money from the United States Government as a result of the information you had furnished in this case? A. I don't remember.

Q. Mr. Powers, don't you know that you have made that statement?

A. Didn't I just tell you that I didn't remember.

Q. I ask you, don't you know, Mr. Powers, that you have made that statement?

A. Didn't I answer that I don't remember?

Q. Answer the question yes or no.

A. I just told you I didn't remember.

Q. Can't you answer that question and tell me yes or no? A. I told you I didn't remember.

Q. That is all the answer that you will make?

A. That is sufficient, isn't it?

Q. Well, I am not arguing that with you, but can you answer any more definitely than that?

A. No, sir.

(Testimony of David G. Powers.)

Q. Have you ever said to anyone that you expected to receive from the Government \$40,000 as the result of your information in this case? A. No, sir.

Q. Have you ever made that statement to the father of your wife? A. Certainly not.

Q. Have you ever told anyone that you expected to receive from \$40,000 to \$60,000, as the result of the information that you gave in this case?

A. No, sir.

Q. Now, Mr. Powers, in the conversations that you had with these people whose names you don't remember, at places that you don't remember and at times that you don't remember, was anything said in regard to the informer's share of the fines in proceedings other than and in addition to criminal proceedings? A. I don't remember. [644—588]

Q. Well, was it not said in those conversations that Mr. Tidwell had made a recommendation that a civil suit be brought looking to the recovery as a penalty, or twice the value at \$6 or \$7.00 a ton, whichever it might be, on these 62,000 tons of coal?

A. I answered that before, no.

Q. It was not said then? A. No.

Mr. ROCHE.—How could Mr. Tidwell bring an action of that kind, Mr. Moore?

Mr. STANLEY MOORE.—I said recommend its being brought. The United States would bring the suit.

Mr. ROCHE.—Don't you know that the United States could not bring any such action?

Mr. STANLEY MOORE.—Haven't you seen the

(Testimony of David G. Powers.)
sections covering that matter?

Mr. ROCHE.—I have seen them, yes, but I say that an action of that kind cannot be brought.

Mr. STANLEY MOORE.—The law is, if your Honor please, although I was questioning the witness—

The COURT.—Let us try the facts of the case; the Court will attend to the law as best it can.

Mr. STANLEY MOORE.—Well, we can discuss the matter with Mr. Roche, if he wants to do it, and we can give him the law in the matter, although we prefer to stick to the cross-examination of the witness at this time.

The COURT.—The Court would much prefer it, too.

Mr. STANLEY MOORE.—Q. Do you remember whether anything was said in these conversations concerning the subject of civil actions and the fines and penalties occurring as a result of that, as well as the criminal action and the proportion of fines with respect to it? [645—589]

A. What are you doing? Trying to kid me. You have asked me the question a dozen times in different ways.

Q. The conversation that you remember was in regard to criminal actions, was it not?

A. I don't understand you.

Q. You understand, do you not, Mr. Powers, that there are two classes of actions; there are criminal cases, as the result of which people are liable to be sent to jail and fined.

(Testimony of David G. Powers.)

A. I am not an attorney, I don't know what you are getting at.

Q. I understand that, but I was just trying to find out from you whether you did understand that there were two kinds of cases; one kind in which people were liable to be sent to jail and fines imposed in addition thereto, and the other which was for the recovery of money merely in the way of fines and there was no question of going to jail involved?

A. I am not an attorney, I don't understand anything about it.

Q. I understand that, but don't you know, generally speaking, that there are those two kinds of cases or law suits?

A. I don't know anything about them other than what I have seen or heard, and I have heard very little.

Q. Then you don't know that, Mr. Powers?

A. No.

Q. You were appointed special agent back in 1912, and according to your recollection in the month of August of that year; is that right? A. Yes, sir.

Q. How long did you continue in your position as special agent by means of these 90-days' appointments made one after the other?

A. I believe I left the Government service sometime in 1913, in July, or August rather; sometime around there.

Q. Then it was sometime in July or August, 1913, and if it commenced sometime in August, 1912, then it was approximately [646—590] a year that, by

(Testimony of David G. Powers.)

the recommendation of Mr. Tidwell, you were special agent to the Government? A. Yes, sir.

Q. What have you been doing since that time, Mr. Powers?

A. Since I left the Government employ you mean?

Q. Yes. A. I have been working at painting.

Q. Doing what? A. Painting.

Q. Were you ever working for any other detective agency? A. No, sir.

Mr. ROCHE.—Mr. Moore, if you will permit me to correct you, he was not a special agent, he was a customs agent.

Mr. STANLEY MOORE.—He was a customs agent?

Mr. ROCHE.—Yes, a customs agent.

Mr. STANLEY MOORE.—Q. What did you understand your position was, Mr. Powers?

A. To get a lot of work for you fellows, and put these fellows where they belong.

Q. What did you understand the position was, the name of the position? A. Customs agent.

Q. Customs agent? A. Yes, sir.

Q. And did you work down at the custom-house?

A. Yes, sir, that is, I was on the outside.

Q. You were under Mr. Tidwell at that time, were you not? A. Yes, sir.

